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THE ANTITRUST IMPROVEMENTS ACT OF 1975

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ANTITRUST AND MONOPOLY

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

S. 1284

A BILL TO IMPROVE AND FACILITATE THE EXPEDITIOUS AND EFFECTIVE ENFORCEMENT OF THE ANTITRUST LAWS

PART 3

FEBRUARY 3; MARCH 2 AND 3, 1976

Printed for the use of the Committee on the Judiciary

(Pursuant to S. Res. 72, Sec. 4)

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THE ANTITRUST IMPROVEMENTS ACT OF 1975

TUESDAY, FEBRUARY 3, 1976

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 2 p.m., in room 2228, Dirksen Senate Office Building, Hon. Roman L. Hruska, presiding.

Present: Senators Hruska and Thurmond.

Staff present: Howard E. O'Leary, chief counsel and staff director; Bernard Nash, assistant counsel; Catherine M. McCarthy, chief clerk; Peter N. Chumbris, minority chief counsel; Emory Sneeden, assistant minority counsel; Garrett Vaughn, minority economist.

Senator HRUSKA. Senator Abourezk should be here shortly, but in order to not impose further on the time of those who have assembled here for this meeting, we will commence, and it will be for the purpose of hearing testimony from Frederick M. Rowe, on behalf of the Grocery Manufacturers of America, with reference to the bill, S. 1284.

Mr. Rowe, we welcome you here. Through the year, you have been a pretty steady customer of the Committee on Antitrust and Monopoly; and we always profit by your wisdom and by your preparation on the subject at hand.

You may proceed with your testimony.

STATEMENT OF FREDERICK M. ROWE, GROCERY MANUFACTURERS OF AMERICA, INC., ACCOMPANIED BY MICHAEL O. WISE

Mr. ROWE. Thank you very much, Senator Hruska.

It is always a great honor and privilege to appear before this subcommittee, not only because of the importance of its responsibilities, but also because of the unfailing graciousness of the members of this subcommittee.

And, while I am at it, I would also like to compliment the staff of the subcommittee for their courtesies in facilitating this appearance on my part, on behalf of the grocery manufacturers, on very short notice.

For the record, my name is Frederick M. Rowe. I am a member of the law firm of Kirkland, Ellis & Rowe, and appear today in my capacity as general counsel of the Grocery Manufacturers of America.

I would like to start out by stating, at the outset, that the Grocery Manufacturers of America and its membership, which comprises manufacturers of grocery products located throughout the United States, is dedicated in favor of the principle of active and vigorous competition embodied in the antitrust laws; however, GMA is vigorously opposed to

title IV, broadening the State attorneys general powers to bring antitrust treble damage actions beyond their existing rights to recover for injuries to the States' proprietary interests.

Also, GMA is opposed to section 704, which would eliminate critical prerequisites established, for decades, to prove an unlawful attempt to monopolize under section 2 of the Sherman Act.

Senator HRUSKA. I am convinced, and I have so advised GMA, that title IV of S. 1284, particularly as revised by the July 1975 committee print, would expose GMA's members to greatly magnified legal liabilities under the antitrust laws, whose dimensions cannot yet be fully evaluated, and that title IV as revised would radically transform the existing application and enforcement of the antitrust laws.

In my considered professional view, revised title IV would represent the most far-reaching expansion in the nature of antitrust enforcement since the Clayton Act of 1914.

Specifically, the committee print reflects a crucial transformation of the original proposal's aims to improve existing compensatory mechanisms to injured parties by antitrust treble damage actions now redressable under section 4 of the Clayton Act.

Instead, the committee print creates a new statutory cause of action, authorizing State attorneys general, and their auxiliary private counsel, to use the Federal judicial system, via the Sherman Act, as a vehicle for the transfer of illegal profits or monopoly overcharges from business firms to the States, for redistribution in unspecified ways under unidentified State laws or under undefined district court discretion.

Moreover, the proposal would not only authorize the transfer and redistribution of such "illegal profits"—and I put that in quotation marks—but would penalize unforeseeable marginal as well as so-called "hard core" Sherman Act violations.

It compels mandatory awards to the States of triple the damage to their general economy or to individual State residents, in the aggregate, without proof of either the fact or the amount of any individual injury, plus additional relief, including attorneys' fees and unspecified other expenses of the litigation.

These revolutionary expansions of antitrust liabilities and forefeitures would apply not only prospectively but retroactively, to preexisting causes of action as well as to pending antitrust class actions for individuals of any kind, even without State interest or State participation.

In my view, the serious ramifications of the 1975 committee print have not received the careful consideration warranted by the magnitude of their transformation of existing antitrust enforcement and liabilities, despite serious questions as to their political, legal, economic, social, and constitutional implications.

As reflected in last week's monumental Supreme Court decision invalidating the enforcement powers of the Federal Elections Commission, I believe serious constitutional issues may be posed by a congressional investiture of State attorneys general, who are not officers appointed by the President under Article II of the Constitution, with the powers to enforce the Federal antitrust laws and to collect huge penalties and forfeitures in litigation in the Federal courts.

Indeed, for the reasons which I will proceed to detail hereafter, in my view, title IV will not only fail to achieve its intended purpose, but may well—and I say this regretfully—degenerate into a shakedown for corporations, a ripoff for consumers and the great bicentennial money machine for antitrust entrepreneurs.

Let me detail the reasons for this statement:

First, I believe that title IV would politicize antitrust enforcement by giving 50-State attorneys general powers to bankrupt business firms with multiple and astronomical damage claims far beyond the powers of the United States Department of Justice.

I believe title IV's authorization to State attorneys general, and their private auxiliaries, to file huge damage claims inevitably creates a grave potential for abuse of power and political reprisal.

To date, under existing law, State officials have been confined to enforcing State antitrust laws and to filing Federal antitrust claims for injuries sustained by the State in its proprietary capacity as a purchaser.

Title IV would magnify these powers by authorizing State attorneys general and their private adjuncts to claim redress for damages both to the State's overall economy and to its residents, individually or collectively.

Now, past antitrust claims asserted on behalf of such large classes have reached multimillion or even billion dollar dimensions.

I submit that such a weapon in the hands of a State attorney general, far beyond the enforcement powers of the United States Department of Justice, entails obvious risks of abuse.

I might say, in this connection, that in studying the record, I noted that the distinguished attorney general of the State of Michigan, Frank J. Kelley, wrote to the committee and expressed his concern, while favoring aspects of the bill, about the potential—as he put it, "We do not wish to ruin the State's business community." The Congress should carefully consider all of the potential effects of these provisions before its passage." [1]

I did not have that reference in my statement. I saw it before my appearance, and I thought it would be worthwhile to point it out.

I believe the temptation for abuse and political grandstanding by such power is plain. Whereas Federal antitrust enforcement has been disciplined by a long and honorable tradition of professionalism in the Department of Justice, no comparable tradition exists at many State levels.

Last month, for example, an opinion by the Fifth Circuit Court of Appeals observed that "In July of 1973, the State of Florida, through its attorney general, commenced an ambitious and highly publicized antitrust action against 17 major oil companies in a Federal district court."

Now, this complaint by the Florida State attorney general alleged a worldwide scheme of anticompetitive activities, and sought the breakup of the major oil companies.

Similar actions to break up oil companies have been filed by the attorneys general of Connecticut, Kansas, and California.

---

[1] The provisions referred to are in section 4C(a)(2) of S. 1284. They are modified by § 4C(a)(1)(B) of the committee print. The text of the letter appears at pp. 670–672 of the printed hearings, part 2.

I don't need to prejudge the merits of those various proceedings, although I note that a Federal Trade Commission administrative law judge recently recommended that a similar FTC case be dismissed.

But, certainly, the potential for "ambitious and highly publicized antitrust action" against other business firms, claiming huge recoveries, is obvious by this new authorization.

I would say the potential for abuse and excess increases with the huge statewide monetary claims which are now authorized by title IV.

Even assuming there will be some supervision by a busy district court, nonetheless, the notion of a large money fund, obtained through settlement or otherwise, administered by transitory State officials who are inexperienced in antitrust matters, is troublesome at best.

An antitrust honeypot in the statehouse or the courthouse invites obvious risks of mismanagement, or worse, even assuming the best of faith by all concerned.

Such dangers, in my view, are aggravated by the committee print's apparent authorization of contingency fee arrangements by State officials, together with private counsel.

The committee print has redefined State attorney general so as to include other "authorized" persons, by State law; and under this authorization, private antitrust counsel may presumably hoist and fly the flag of the State when filing antitrust actions on behalf of the State's general economy or the State's residents.

Now, in view of the abuses of such arrangements expressed by many courts over the years, including the conflict of interest, where private counsel's potentially large legal fee aspirations dwarf the small interests of the individual members of the claimant class, I would think that title IV's authorization of such arrangements is highly questionable, especially considering the magnitude of the claims which are thus authorized.

The prospect of State officials joining hands with private counsel as antitrust entrepreneurs to secure huge monetary recoveries under the aegis of the State, raises questions which deserve the most thoughtful reflection.

The Supreme Court's decision last week on Federal election reform legislation certainly recalls the potential for pollution of large money floating in political waters.

Title IV's investiture of State attorneys general, and their private adjuncts, with new Federal powers to collect huge monetary claims, deserves the most probing assessment, again, assuming the best of faith by all concerned.

In view of these considerations, therefore, GMA opposes title IV's concept of a State attorney general acting as an antitrust money collector and entrepreneur, rather than as a State enforcement official.

Let me go back to the history, briefly, of class actions which would be broadened under title IV, and which is marked by repeated court criticisms of rampant class action abuses in the past.

I do not mean to belabor and cumulate the record with matters which have been previously discussed at length. But I think it is encumbent that the committee should consider, in view of the fact that, apparently, a decision by the Ninth Circuit Court of Apeals in the *Asphalt* case is cited as apparent authority for this legislation, that the ninth circuit, on two occasions, has castigated the abuses inherent

in antitrust class actions, in the one case, asserting liabilities of $750 million against 2,000 real estate brokers, jointly and individually, on all 2,000 of them.

And as Judge Duniway put it:

> The real bonanza in a case like this, if it is won, will go to counsel. I venture to suggest that none of the class action features of this case was dreamed up by the named plaintiffs, but that all of them are the brain children of their attorneys. I doubt that plaintiffs' counsel expect the immense and unmanageable case that they seek to create to be tried. What they seek to create will become, whether they intend this result or not, an overwhelmingly costly and potent engine for the compulsion of settlements, whether just or unjust. Most, though by no means all, real estate brokers are small businessmen. They cannot afford even to participate in such an action as this, much less to defend it effectively.

The same Ninth Circuit Court of Appeals which decided the *Liquid Asphalt* case, which is included in the record, also denounced a class action claiming $80 million, $2 per claimant, based on an alleged conspiracy among 47 hotel chains and 600 hotels, to increase the room rates by adding a charge for telephone calls.

As the court put it:

> In view of the nonexistent, or miniscule, recoveries that are likely to accrue to the supposedly intended beneficiaries, it is not surprising that most of the named plaintiffs are attorneys acting as counsel for themselves. This action has been primarily generated and financially supported by the lawyers, who possibly stand to realize astronomical fees, and not by the individuals whose potential claims, in any event, are de minimis.

Senator HRUSKA. Mr. Rowe, a rollcall vote is in progress in the Senate; I will return as soon as I can.

Would you suspend for a little while?

Mr. ROWE. Thank you very much, Senator Hruska. I will do that.

[Recess.]

Senator HRUSKA. The committee will resume its proceedings.

You may proceed, Mr. Rowe.

Mr. ROWE. Thank you, Senator.

May I request from the Chair permission to submit for the record these two ninth circuit opinions, the *Kline* and the *Telephone* opinion, which I have excerpted?

I believe they would create a balance in the record between the other ninth circuit opinion cited in support of the proposal—and they are relatively short.

May I request their inclusion in the record, in addition to my own prepared statement? [1]

Senator HRUSKA. I did not get it.

Mr. ROWE. May I request the inclusion in the record of the *Kline* and *Hotel Telephone* opinions, which I have excerpted?

I think they will create a balance with the other ninth circuit case that has been cited in support of the proposal which is in the record.

Senator HRUSKA. Which cases are those—the *Kline* and the *Telephone Company?*

Mr. ROWE. The *Kline* case [2] and the *Hotel Telephone Charge* case.[3]

Senator HRUSKA. The request will be granted; they will be incorporated in the record.

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[1] Prepared statement appears on p. 20.
[2] See p. 678.
[3] See p. 671.

Mr. ROWE. Thank you very much, Senator.

Mr. ROWE. I have pointed out that these two cases highlighted prevalent abuses in class actions which, in my view, would not only be perpetuated but could well be magnified by title IV if enacted in its present form.

Apart from these two rulings by the court of appeals, other courts have also stressed the miniscule recoveries by the intended beneficiaries of these cases while, as they put it, "lawyers have reaped a golden harvest of fees."

And the respected Judge Friendly, of the Court of Appeals for the Second Circuit, has deplored the degeneration of the large antitrust class action into a vehicle for blackmail settlements.

My point is that the judicial disenchantment with these suits is reflected in many reports, in deicsions in the antitrust field, and casts a substantial question on any proposal that would magnify the availability of that kind of litigation in the Federal courts.

Now, abuse aside, antitrust litigation is extremely costly, in any event. Even those cases which are settled—and many of them are settled—are preceded by extended pretrial proceedings, discovery and motions, which eat up the resources of the parties at the high cost commanded by antitrust specialists in litigation, which are necessary where the stakes are high and errors may be fatal.

Therefore, wholly apart from any question of abuse, the new litigation which is authorized by title IV would inflict the potential for more costly antitrust litigation for business firms, at the instance of the State attorney general, and his private auxiliaries, which imposes additional heavy cost burdens at a time when cost-price inflation remains a real peril.

Now, significantly, many of the safeguards which the courts have developed over the years to discipline abuses and to protect against unmanageable litigation in the antitrust field, in class actions, may be eliminated by this committee print.

For example, the original bill spoke in terms of judicial discretion to designate the State attorney general as a representative of a class. This would, of course, preserve the precedents and protective mechanisms established by the courts in Federal Rule of Civil Procedure 23.

However, the committee print has deleted all references to a class or classes in actions brought by the State attorney general, which would presumably oust the constraints and precedents under rule 23 which guard against harassment of business and inundation of the courts.

Accordingly, the type of antitrust class action which has been denounced and dismissed by courts as unmanageable, extortionate, or tainted, may well gain new life under title IV's State authorization.

For example, will a State attorney general, or the corporation counsel of the District of Columbia, who is specially deputized by this bill, refuse or offer by a private antitrust counsel to file suit on a contingency basis, at no cost to the State, to collect massive overcharges or illegal profits from antitrust malefactors, large or small?

State officials willing, the real estate brokers, the 2,000 real estate brokers in California, the 600 hotels involved in these two ninth circuit cases may well be revisited on a contingency basis, with an arrangement authorized by the State or the State attorney general, at no ex-

pense to the State, and with the possibility of a substantial settlement, plus attorneys' fees and undefined other expenses, benefiting the State and benefiting the lawyers.

Actually, since many large companies have developed, of necessity, a hardnosed refusal to settle specious antitrust class actions and have gained experience in the successful defense of flimsy antitrust litigation, the less experienced, less sophisticated smaller firms or individual providers of services, such as real estate brokers, may become the most conspicuous victims.

For example, the Federal Trade Commission, last December, sued the American Medical Association for price fixing of doctors' services, due to the antisolicitation and antiadvertising restrictions in the AMA "Principles of Medical Ethics."

Now, with health care costs having gone through the roof, would not a title IV case against thousands of doctors be attractive to a State attorney general or a District of Columbia corporation counsel, if offered by an enterprising lawyer on a contingency fee basis, with the doctors as coconspirators subject to contingent antitrust liabilities running into the millions, individually and jointly, just like the real estate brokers in California?

I submit, on top of the malpractice litigation disaster, under those circumstances, doctors might well seek sanctuary as an endangered species.

Notably, the antitrust claims authorized by title IV for treble damage recoveries plus attorneys' fees are not confined to price-fixing conspiracies or so-called hardcore or per se antitrust infractions, but they, rather, range the entire broad sweep of the Sherman Act's generalities.

As perceived by Assistant Attorney General Kauper, this title IV overkill may inflict staggering liabilities for marginal antitrust violations, under unforeseeable shifts of interpretation of the Sherman Act's vague prohibitions.

I would like to mention that the committee print deletes prior authorizations for suits under sections 2 and 7 of the Clayton Act, but that is cold comfort, because the very same transactions that could have been pleaded and sued under sections 2 and 7 of of the Clayton Act may equally be pleaded under the Sherman Act. So the change may well be more cosmetic than real.

The broad generalities of the Sherman Act would provide the authorization for suits to be brought which could include mergers and acquisitions, which have been traditionally sued under section 7, as established by the *Lexington Bank* case.[1]

They could be pleaded under the Sherman Act for price cutting, which is section 2 of the Clayton Act, amended by the Robinson-Patman Act. But the Sherman Act, as in the *Paterson Parchment* case,[2] has also been invoked against price cutting activities.

So my point is the deletion of sections 2 and 7 of the Clayton Act from the scope of the bill, while certainly beneficial, may be more cosmetic than substantive because the same transactions may be pleaded under the Sherman Act.

---

[1] *United States v. First National Bank and Trust Co. of Lexington*, 376 U.S. 665 (1964).
[2] *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

Now, I would like to point out that even the proponents of the abortive 1970 consumer class action proposal, S. 3201, acknowledged the need for specifying particular activities as unlawful prior to creating harsh legal exposures.

And I have been surprised, Senator, in my study of the record of the hearings of this committee on this bill, how little comparison there has been made between the abortive proposal in 1970 for consumer class actions and the dangers which were stressed by such liabilities by a number of witnesses, that no analysis of the comparisons that are apparent has been made, because they may well be salutary in light of particular testimony, which I will come to, on behalf of the Judicial Conference, which was in the record of the hearings in 1970.

Now, with the vastly enlarged liabilities inflicted by title IV, in my view, no conceivable justification exists for authorizing devastating claims based on the vague generalities of the Sherman Act, imposing treble forfeitures for unforeseeable infractions, and making such treble damage assessments mandatory on the courts, not discretionary, coupled with attorneys' fees and undefined other expenses of litigation. That has not been done before. That is new.

Former Chief of the Antitrust Division, Prof. Donald A. Turner, who is well known to this committee as a staunch supporter of the antitrust laws, stated only weeks ago, before the New York State Bar Association that, in view of the private damage cases which have been brought, ranging from the "weak to the frivolous," he "would probably recommend against including any private right of action" if the Clayton Act were to be rewritten today.

Now, in light of the dubious history of antitrust enforcement by private trebel damage class actions in the past, I respectfully submit that a radical expansion of such actions, via State attorneys general, appears highly questionable at this time.

I will go on to detail what I deem is of paramount importance in the legislative consideration of this proposal; namely, that no substantial benefits to consumers that are apparent, outweigh the grave potential for abuse and the economic and social costs of the overkill that would be enacted by title IV.

In handling class actions in the antitrust field in the past, courts have noted that the prospects of any substantial recoveries by individual consumers were quite remote. For example, the courts in California, as I mentioned previously have denounced an $80 million class action, brought by attorneys on a contingency fee basis, which were based on a $2 per individual claim, arising out of alleged service charges imposed by hotels for telephone calls; $2 per individual was the claim.

Likewise, a $1½ million class action was dismissed by the courts because it sought a $1 per person claim, based on alleged overcharges imposed on car rental services. This suit was brought by 1½ million class members, aggregating together a $1 service charge claim by each car rental user.

Another Court of Appeals, the 2d Circuit Court of Appeals, dismissed as specious a class action on behalf of 125 million people, whose attorneys claimed $375 trillion, plus $3 million attorneys' fees, against automobile manufacturers.

And, in checking on that case, I noted that that complaint was amended. The claim was larger, and the counsel amended the complaint and reduced the claim to $375 trillion for 125 million people. He had more claimants in his class claiming more money, but he amended his complaint, and, of course, the court dismissed it as totally unmanageable and preposterous as an antitrust action to be processed through the judicial system of the United States.

Indeed, in such actions, most of the so-called members of the consumer class may not even want to participate, if given the option.

Now, the heavy burdens of such costly litigation, even if ultimately resulting in settlements, must, in the end, be carried by consumers in the form of higher prices, aggravating inflationary burdens.

These cases are not litigated for free. Indeed, according to the court in this *Avis* case, involving the dollar overcharge on car rental fees, the court said: "individual members of the class are unlikely to receive any significant personal benefit from a successful prosecution of this suit and, indeed, may ultimately have to pay for it through subsequently increased costs of car rental."

Apart from questions of abuse, the costs of massive antitrust litigation are heavy, at best, for all sides. Where large financial interests are at stake and the risks of error may be fatal, experienced antitrust litigation counsel, on both sides, are necessary, which create substantial cost burdens. These burdens are not eliminated by settlements because these settlements typically come about only after protracted and costly pretrial proceedings, including discovery and complex motions.

The courts in these cases have accurately perceived that the real parties in interest in these massive antitrust class actions are not the consumers, but are the lawyers.

One district judge noted the "minuscule recoveries by its intended beneficiaries, while lawyers have reaped a golden harvest of fees." Other courts in these cases have denounced the "contingent fee syndrome," and another court cited the Italian proverb that "A lawsuit is a fruit tree planted in a lawyer's garden."

These cases have reflected contingency fee awards of $5 million in a $22 million settlement and $2 million in a $26 million settlement.

And I thought it quite interesting, quite significant, that one illustrious, well-known class action specialist, the notable and prominent former Mayor Alioto, of San Francisco, told this committee that class actions "become so lucrative to some lawyers they kind of leap into the thing; so lucrative that they will not take any other kind of actions."

I might say the beneficiaries of such litigation, of course, are not confined to the plaintiff's attorneys, but the defendant's attorneys, as well, are benefited by the heavy costs and economic burdens of such litigation.

I am not, therefore, in any way, implying any questionable activity on the part of counsel in these litigations. The economic benefits are shared by the bar; the plaintiffs' bar and the defendants' bar alike. The question, however, is the public interest in the expansion and the proliferation and the greater availability of such litigation in the Federal judicial system where the real beneficiaries are not the consumers, but the lawyers, the lawyers for the plaintiff and the lawyers for defendants.

The question is one of public interest, not whether the plaintiff's lawyers have a greater opportunity for enrichment than the defendant's lawyers, but, rather, whether the public interest is advanced or injured by the additional authorization and proliferation of such litigation in the Federal courts under the flag of State attorneys general.

Apart from the question of burdens, economic burdens, many courts have vehemently deplored the intolerable burdens of this litigation on the judicial system, which is certainly a matter of distinct and vital concern to this committee.

Only weeks ago, a Pittsburgh district judge reported the judiciary's "increasing disenchantment" with antitrust class actions, which he said had become a "serious drag upon judicial functions." A New York district judge threw out an antitrust class action for fear that it would immobilize "for years to come, the Federal judicial personnel involved."

The infliction on the judicial system of additional massive antitrust litigation, in this context, is now uniquely untimely, with mounting case backlogs slowing civil and criminal trials due to inadequate judicial resources.

Chief Justice Burger's 1975 state of the Judiciary message pointed to the "crisis" in the administration of justice "particularly in the larger districts" due to inadequate judicial resources.

And, by the way, those are the districts which typically are the venue for substantial class actions in the antitrust field.

This court crisis, which is a matter of substantial public concern, must be viewed in the context of the dramatic rise of civil antitrust litigation in the Federal system.

In 1975, 1400 antitrust actions were filed, up 50 percent from 929 such actions in 1970. Even more strikingly, 190 reported antitrust class actions alone were filed in 1975, up over 60 percent over the 114 class actions filed in 1974, mostly in judicial districts with growing civil or criminal case backlogs.

The inflationary syndrome certainly has reflected itself in the proliferation of antitrust class actions, even more so proportionately than in many other fields of interest to the public interest and to this committee.

And so my point is that, amid a mounting crime and court "crisis," due to inadequate judicial resources, it appears highly questionable to choke the judicial system with more massive antitrust litigation, which can only aggravate the coming crunch of the Speedy Trials Act of 1974 in processing critical cases in the Federal system.

In this connection, I would like to refer to an address which I have included in my statement, by the Honorable Judge Northrup, the Chief Judge of the District of Maryland, which is reported in the Baltimore Daily Record.[1] Judge Northrup, in an address to the Maryland State Bar Association on January 9, 1976, also deplored the case burdens, particularly on that district, which has a heavy case load of Federal criminal trials, by way of tax frauds and other Federal offenses.

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[1] See p. 692.

He also complained, among other things, in his address to this Maryland State Bar, of the load cast by the multiparty complex antitrust and patent-type litigation in his district, as well as others.

He stated: "The continuing flow of legislation, without supplementing the tools of our trade, additional judges and supporting personnel, can only result in a total inundation and frustration of our Federal judicial system."

And so Chief Justice Burger's admonitions about choking the courts with additional litigation, fostered by congressional enactments, has been echoed, in particular, by the Chief Judge of Baltimore, Md., based on his experience with processing a heavy criminal case load.

As the Senators know, the Speedy Trials Act of 1974, which casts upon the courts the obligation of either trying or springing criminals within a short period of time, is an additional reason for the judicial crisis which would militate against, or at least warrant very serious thought of, further inundating the courts with more massive litigation which they must process.

Now, let me go beyond the question of the situation in the courts. In that connection, I understand that Administrator Kirks of the Administrative Office of the U.S. Courts, has suggested to the House committee, which is considering comparable legislation, that they seek an estimate by the proponents of the legislation as to the burdens that such legislation would place on the judicial system.

This is a letter dated July 23, 1975, addressed by Roland F. Kirks, who is the Director of the Administrative Office of the U.S. Courts, to Hon. James R. Mann of the U.S. House of Representatives. And in this letter, he responds to a request by Mr. Mann, and, in pertinent part, states that the legislation which, at that time, was before the House committee, would increase the work load imposed on the judiciary in a substantial way.

And also he stated:

> In the past, the Judicial Conference of the United States has suggested to the Congress that the proponents of legislation, who presumably have firsthand knowledge of the problems addressed by the legislation, and are in the best position to know its potential impact on the courts, be requested to furnish information to the Congress.

So far as I know, no such analysis of that impact of the legislation has been made for consideration by this committee, and I would certainly recommend that any thoughtful, fully deliberated determination by this committee would benefit substantially by the appropriate inputs by the judiciary and by the Administrative Office of the U.S. Courts.

Senator HRUSKA. The full text of that letter, it would be well to have it included in the text so it will appear in the record.[1]

Mr. ROWE. Thank you, Senator.

Senator HRUSKA. Is there any other correspondence with the Administrative Office of the Courts? I have directed a letter, too, to Mr. Kirks and also a letter to the Chief Justice on this same point. But I had not been aware of this letter of July 23 until only recently. And I have some additional points of inquiry to make over and above the points that are covered in that July 23 letter.

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[1] Letter of July 23, 1975, p. 407.

The text of those letters [1] of inquiry will be included in the record, and we hope that some answers will be coming in time so that, before this record is closed, they can be incorporated into the record.

Mr. ROWE. That would be most important, Senator, for consideration by the Senate.

Let me go on, apart from the question of impact on the judiciary, to what I consider to be a paradox of this proposal in title IV; namely, that I respectfully submit that smaller business firms may well be the greatest losers of the enforcement authorized by title IV.

Somewhat perversely, monster antitrust litigation of the type authorized by this title may disproportionately victimize the smaller business firm, rather than the corporate giants.

And I may say the Grocery Manufacturers of America, which I represent, counts, among its members, numerous smaller business firms, which, as I view it, may well be disproportionately victimized by the liabilities and by the exposures which this title would inflict.

I say this because many large firms, based on their litigation experience, have developed a know-how to cope with antitrust treble damage litigation, and have adopted a policy against accepting settlements in flimsy litigation of specious claims, which would only invite further litigation.

Also, the risk of potential liability for a giant firm, albeit substantial, may sometimes be relatively tolerable, so as to justify a decision to litigate a large claim, despite the inherent uncertainties of antitrust litigation before juries, which apply shifting and elusive antitrust principles. Of course, in the end, the consumer pays for the cost of that kind of litigation with a giant firm in the form of higher prices. But, by contrast, a smaller firm, which is charged as an antitrust coconspirator, with joint and individual liability for alleged industrywide conspiracy, may be unable to stand the risk of a potentially astronomical exposure.

In these antitrust cases, as the committee knows, frequently there is a large class of coconspirators. A suit is not only against a large company, but there is a slew of other companies and satellites and sometimes dealers and other people in the business, all of whom become liable, individually and jointly, as coconspirators.

Now, this was the case in the $750 million potential liability of each of these 2,000 real estate brokerage firms, which I mentioned previously to the committee, which was dismissed because the case shocked the conscience of the court.

The court stressed—and understandably its conscience was shocked:

> The small individual operator faces a potential liability of upwards of three-quarters of a billion dollars for which all of his or her assets are responsible. The amount of a recovery in a lawsuit is not ordinarily of concern where a wrong has been inflicted and an injury suffered. But when 2,000 are joined in an action where each is jointly and severally liable, the liability is increased in geometric progression. Such an award against each of 2,000 real estate broker defendants would shock the conscience.

I mentioned, before, the possibility of a large suit against doctors as joint conspirators, as coconspirators. This would have the same effect potentially and is inherently conducive to the kind of "blackmail settlement" which was denounced by Chief Judge Friendly, because a smaller defendant faced with this kind of exposure as a coconspira-

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[1] See pp. 398–399.

tor simply cannot often carry the risk or the cost of an effective defense.

Now, it is in this context why it becomes understandable that, as one witness stated in the 1970 hearings, that "99 percent of these cases get settled."

In the same hearings, the sagacious former Senator, Sam Ervin, observed, and I quote:

> In the antitrust field . . . many people agree to a settlement because it is cheaper to reach a settlement and pay certain sums of money than it is to litigate. . . . I know many cases that are settled because it is cheaper to settle, cheaper to buy your peace, than it is to seek justice.

And he said, "I have recommended that to clients many times myself."

And so this vulnerability, particularly of smaller firms, to such litigation, and their vulnerability to settlements, has created a litigation tactic now of joining many smaller firms, such as dealers, as patsy defendant coconspirators, with larger manufacturer defendants, in mass antitrust cases.

Such people who are unable to afford a real defense may readily accept settlement on a seriatim basis, and those settlements can build a kitty to finance further litigation against the main defendants.

Let me make one other point which I believe is of significance to consideration of this legislation, and that is the impediment to financing and access to capital markets by the smaller firm, by reason of the contingent liabilities of such massive litigation in which it is named as a defendant or coconspirator.

Regulations by the SEC require disclosure of contingent liabilities which are material in financial statements for the protection of the investing public. Because of these requirements, corporate auditors may insist on legal opinions by counsel as to the amounts of contingent liabilities arising out of pending litigation.

Without definitive assurance by counsel against material liabilities from such litigation, a company may only get a qualified auditor's statement. With the "problem bank" problem today, where banks are under scrutiny for making risky loans, the access to financing by a smaller firm, which is already less attractive as a credit risk than a corporate giant, may be further limited if it cannot come up with a clean auditor's report by reason of its substantial exposure as a coconspirator to large contingent liabilities in massive antitrust litigation.

Since counsel cannot predict with certainty the outcome of such litigation, where the liabilities under the Sherman Act are constantly shifting, the inability to present a clean auditor's report by a smaller firm may become a serious impediment to its financing and access to capital, which is so essential to its growth and to its competitive survival.

Let me also invite the committee's attention to the statement by Mr. Kauper, the Chief of the Antitrust Division, who spoke to this point. Mr. Kauper expressed his serious concern with the problems of the specter of massive recoveries based on unquantifiable, and perhaps totally unforeseeable, damages multiplied by three. And, as he put it:

> This kind of damage assessment might result in significant impairment to the viability of those firms from whom such damages were recovered. Such a result, in itself, could have anticompetitive consequences since only the largest firms involved in a given violation might survive the financial pressure of such damage awards.

This is Chief of the Antitrust Division Kauper expressing his grave concerns with the sweep and the scope and the liability imposed by title IV.

As a matter of fact, even Mr. Ralph Nader disapproved of treble damages under title IV for injury to a State's "general economy" since Mr. Nader stated that "unexpected liability when trebled could easily bankrupt culpable local or State firms."

I submit, Senator Hruska, that when Antitrust Division Chief Kauper and Ralph Nader, together, express a grave concern about the impact of this legislation on the smaller firm, I would certainly think that the committee and the Congress would take notice of that fact.

These gentlemen are not noted for excessive solicitude for the business community. And when Mr. Nader speaks of the potential of bankruptcy of local or State firms arising out of title IV's authorization, I thought that was particularly noteworthy to stress.

Of course, these liabilities do not only attend smaller firms. A larger firm may also face disaster, if targeted for massive antitrust exposure. For example, retail grocery chains may have a large sales volume, but relatively low net profits. Take a weaker company, like the A&P, which is currently subject to massive damage exposures by multiple cattlemen's antitrust actions.

My point is, that even for a larger and a vigorous company, let alone a vulnerable giant, the potential holocaust of a treble statewide antitrust damage exposure may be a financial disaster.

And so, overzealous pursuit as per title IV of "monopoly overcharges," might well boomerang by victimizing particularly the smaller or weaker enterprise, while benefiting the lawyers rather than the consumer.

As I pointed out previously, I was most impressed by the letter addressed to Senator Hart and this committee by the attorney general of the State of Michigan, where the attorney general of the State of Michigan, Mr. Frank J. Kelley, said: "It is important to prevent antitrust violations to help the general economy of the State, but in the process we do not want to ruin the State's business community. The Congress should carefully consider all the potential effects, of section 4C(a)(2) before its passage." [1] And that is the treble recovery provision of title IV.

Now, let me point to some conspicuous omissions which, as I see it, preclude the necessary careful and thoughtful and informed consideration by this committee and by the Congress of these extremely far-reaching proposals.

As I pointed out before, the committee print reflects the transformation of S. 1284 from the principle of compensation for injured persons under section 4 of the Clayton Act to the principle of monopoly overcharge or illegal profits confiscated by the States, conditioned on redistribution to residents.

This, as is quite clear in the hearings and in the testimony and in the colloquy between counsel and witnesses, would create a "new cause of action" on behalf of the State, and a "new substantive antitrust claim."

I particularly stress in the record the colloquies with Professor Rose of the Arizona State University, and with Mr. Shapiro, a well-known

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[1] See p. 671 of the printed hearings, part 2.

expert in antitrust treble damage litigation, which reflect, as well as a statement by Senator Hart, himself, that clearly, a new antitrust cause of action is intended here.

This is not merely a procedural reform. This is not merely creating a special remedy. This is a new statutory cause of action under the antitrust laws. And I have referred in my footnotes to the statement to these particular colloquies.

Now, significantly, in light of the testimony which also states that such modifications in the prior text of the bill were appropriate so that the courts would not obstruct the broad legislative aim of this reform, the committee print now has deleted, in pertinent places, the prior references to section 4 of the Clayton Act, as to suits by the Attorney General, because section 4 requires a showing of injury as an element of a private treble damage cause of action.

That reference, with respect to suits by the Attorney General, to section 4 has been deleted. Apparently, for similar reasons, the committee print has deleted references to parens patriae, which were previously there to define the kind of suit the State attorney general could bring, since this concept also, as Professor Rose advised the committee, might be construed by the courts to limit the kind of recovery that might be secured by the State attorney general, when he went after malefactors to recapture illegal profits and overcharges.

I very respectfully invite the committee's consideration to the colloquies on pages 478 and 482 of the hearings, with Professor Rose and with counsel for the committee, where it is made quite clear that a substantial substantive change in the cause of action under the antitrust laws is intended by this legislation. As Professor Rose put it:

> This is a whole new ball game. This is a new substantive antitrust claim. And I think it is clear; I certainly think it would not hurt to make it clearer so some court does not have the opportunity to undo a great deal of what I think Congress intends to do here.

And Professor Rose speaks of proceedings where corporations will account for "illegal profits." The understanding that Professor Rose has is also reflected in discussing a case where the attorney general goes to court "to recover too much money." Fine, let him prove it. But the burden of proof ought to be on him. The professor is talking about a defendant being given his day in court to show that the State was not injured.

And Senator Hart—and this is at page 480 of the hearings—also states in regard to Professor Rose's testimony that it is useful, especially as they reminded us that this is a new antitrust action under section 4 of the Clayton Act.

And so what I am saying is, this is a significant expansion of antitrust, not by way of remedies, but by way of enlargement and extension of the substantive cause of action of the antitrust laws.

Now, in my view, substantial constitutional problems may arise from such a new statutory cause of action under the Sherman Act, enforceable by a State attorney general or his private auxiliary, which at least require examination.

Only last Friday the Supreme Court invalidated the enforcement functions of the Federal Elections Commission. It interpreted article II of the Constitution as limiting the authority to enforce Federal

statutes by litigation in the Federal courts to officers duly appointed by the President under article II of the Constitution.

I have not made a profound analysis of all of the ramifications of the Supreme Court's very learned and very extended opinion handed down last Friday. But I would certainly think that a careful study of the legal implications of that Supreme Court decision may reveal another constitutional infirmity of title IV by reason of its authorization of a new statutory cause of action with forfeitures and penalties to be enforced by Federal court litigation brought by a State Attorney general, or his private adjunct, not appointed by the President, above and beyond the antitrust enforcement authority previously reposed in the Attorney General of the United States.

Again I caution, I have not made a profound scholarly analysis, such as the seriousness of the question deserves, of the full implications and purport of the Supreme Court's landmark opinion. But I could not escape noting the significance of the potential question raised by the Court's opinion and particularly the passage where the Court referred to the powers of the Federal Election Commission as to litigation conducted in the courts of the United States. As the Court's opinion pointed out—and this is reported in 44 U.S. Law Week at page 4169:

> Whether tested, therefore, by the requirements of the Judiciary Act or by the usage of the Government, or by the decisions of this court, it is clear that all such suits, so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney General.

This is the proper way for the executive to execute and implement the powers which are legislated by the Congress. But then the Court went on to say:

> We hold that these provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Article II, cl. 2, § 2 of the Constitution.
>
> Such functions may be discharged only by persons who are "Officers of the United States" within the language of that Section.

I found it interesting in that connection, and again, I have not researched this question in the time available with the degree of profundity which it deserves. I did find it interesting to note that the Federal Food, Drug, and Cosmetics Act authorizes auxiliary investigation at the State level, only by State people who are "commissioned by the Secretary as an officer of the Department of HEW." That is under article II of the Constitution, and that is in section 702(a) of the Food, Drug, and Cosmetics Act.

My point, therefore, is that once the authorization of title IV departs from a question of compensation for injury to the point of enforcement by State attorneys general of new liabilities, new substantive antitrust liabilities created under title IV, in the courts of the United States, seeking substantial penalties and forfeitures—not merely actual damages, but treble damages and forfeitures—a substantial question would arise which at least deserves some scholarly exploration in view of the recent Supreme Court opinion. This, as I say, invalidated litigation and enforcement functions of the Federal Elections Commission, because they were carried out by Commission members which were not appointed by the President under article II of the Constitution.

The Supreme Court's decision requires thoughtful consideration, particularly when a State attorney general, the newly proposed repository under title IV of antitrust enforcement authority, may sue to collect treble damages and forfeitures of a quasi-penal nature, which are not commensurate with any actual injury sustained or proved as a basis for recovery.

There are other constitutional infirmities of title IV which I believe have also received insufficient consideration. The deprivation of the right to jury trial under the seventh amendment as to each individual claim asserted against a defendant has been noted in the hearings without definitive answer.

As I recall it, the question was raised by the American College of Trial Lawyers, and there is a letter in the record by professor Miller of the Harvard Law School, which acknowledges that this was a substantial question, which in his view would be resolved in the affirmative, in favor of constitutionality.

But I would submit, respectfully, that one letter by a professor of the Harvard Law School—and I respect deeply his scholarship, even though I'm a Yale Law School man—may be an inadequate basis for this committee to reach a judgment as to a substantial constitutional question posed by this legislation.

The potential for unconscionable penalties by ruinous treble damages for unforeseeable liabilities, as pointed out by Antitrust Division Chief Kauper, which are based on vague new substantive antitrust causes of action, may pose further constitutional questions, wholly apart from, to me, the transparent and glaring vulnerability in title IV because of the retroactive application of title IV under section 405.

Indeed, such constitutional issues may be aggravated by the exposure to such new and unfathomable liabilities by business firms which are already expressly subject to the recently stiffened criminal penalties of up to 3 years' imprisonment and heavy fines or Sherman Act violations as felonies.

And so, I would suggest, most respectfully, that the constitutional dilemmas posed by the committee print revision of title IV would indicate, at the very least, the advisability of an authoritative legal opinion by the Attorney General or other similar impeccable legal authority to avert a legal fiasco for this committee and for the Congress which would certainly benefit no one.

In this connection, the incumbent Attorney General, Edward H. Levi, is not only a well-known constitutional scholar, but a scholar in the field of antitrust as well.

Furthermore, as pointed out by Antitrust Division Chief Thomas Kauper, the interaction of title IV with Federal rule 23 is steeped in confusion, which in my mind is deepening.

As Mr. Kauper suggested in his testimony before the committee, the interaction between rule 23 and title IV deserves serious scrutiny. He indicated, and I would heartily concur, that an assessment of all of rule 23's operations is plainly in order, in view of the judicial disenchantment and in view of the judicial experience in curbing misuse and abuse in the class litigation which is governed by rule 23.

It may well be that the deletion in the committee print of references to classes in the section which applies to suits by the State attorney

general may reflect a deliberate purpose to rule out the application of rule 23. That would certainly clarify the situation and simplify the situation, because the constraints of rule 23 would simply have no application whatsoever in a suit brought by the State attorney general, or his private auxiliary, flying the flag of the State.

The kind of case which was thrown out by the courts as unmanageable, as impervious to treatment by the judicial process, might well have to stay in the Federal district court because the protective safeguards of rule 23 would no longer be applicable to permit the court, in its discretion under rule 23, to dismiss such a case which was choking his docket.

But also, in another place, the committee print refers to a class action on behalf of natural persons, that is, where the State attorney general is not involved, and so with that type of provision, since the committee print there retains the concept of class action, presumably, rule 23 of the Federal Rules of Civil Procedure would apply.

So my point is that with respect to some aspects of title IV, rule 23 may be obliterated; with respect to another aspect of title IV, another clause, rule 23 may be preserved. And as Assistant Attorney General Kauper very perceptively pointed out, the confusion in which the situation is steeped warrants very careful clarification by this committee before any definitive judgment can be made as to the merits of this situation.

The judiciary certainly is entitled to more clarity than now exists if they are to be invested with the responsibility for processing this litigation. The committee should indicate with clarity just what the procedural groundrules are, whether rule 23 does or does not apply, and what are the litigation incidents of title IV's authorization. This would appear to be highly essential.

Furthermore, the record of the committee's hearings is devoid of input by the judiciary, or consideration by the committee as to the judicial resources necessary for the title's implementation. As I pointed out previously, Chief Justice Burger noted the crisis in the larger districts, where massive class actions in the antitrust field are often brought. I would hope the request for information, to which Senator Hruska adverted at an earlier point in the proceedings this afternoon, may supply some of the essential clarification by way of information, which I would deem very important for an informed assessment by the committee as to the resources of the judicial system which would be necessary to implement title IV's authorization, assuming this legislation were deemed to be otherwise meritorious.

I think, also, in view of the testimony in 1970 by the late Chief Judge Murrah and by Administrator Kirks, these considerations may become very important.

As the committee doubtless recalls, in 1970 there were comparable proposals for consumer class actions which ultimately proved abortive.

In the course of the committee's deliberations and hearings on these proposals in 1970, the late Chief Judge Murrah, who was then in charge of the judicial center, and Administrator Kirks presented very helpful and authoritative testimony to this committee. Judge Murrah, in particular, stressed that class actions by enterprising attorneys can "really breed chaos in the courts."

This was way back in 1970 and, as I pointed out, the statistical record has dramatically demonstrated the proliferation of those actions in the judicial system. They have sprouted like mushrooms, and whatever the situation was in 1970, I think the statistical record will demonstrate that the problem has been substantially aggravated in the recent 5 years.

I have also pointed out the judiciary responsibilities under the Speedy Trials Act of 1974, to either try or spring accused criminals in the Federal courts, and I believe the question of burdens on the judiciary posed by this legislation are a matter of paramount concern for the committee's considerations.

I think the total absence, to date, of inputs from the judiciary as to the courts' experience with massive antitrust litigation, as I see it, can only stultify any informed deliberations by the Senate, as to important public interest implications of title IV.

On another aspect of this, the committee record to date contains no assessment of the inflationary impact of fomenting new and costly antitrust litigation. It contains no cost-benefit analyses of the most minimal sort, to support a reasonable legislative decision as to the cost of the legislation, balanced against its prospective benefits.

It contains no assessment by the Congressional Budget Office of options for a potentially more efficient, and less wasteful delivery system of benefits to the consumer, which is apparently a principal philosophy of title IV, as conceived by its framers.

Now, assuming some merit in title IV's apparent objective of transferring "illegal profits," so-called, and "monopoly overcharges," so-called, from corporate malefactors to victimized consumers, surely some examination of the efficiency of the chosen instrument to achieve such results would be in order.

Apart from title IV's other defects, its choice of inherently costly and wasteful antitrust litigation in the Federal courts, as a delivery mechanism for social benefits, appears highly dubious at best, and at least deserving of serious, careful comparative study with other possible rational alternatives.

At a minimum, such a study would include evaluation of mechanisms such as those contained in the FTC Improvements Act of 1975 which, among other things, authorize FTC civil actions in the courts to recover money, in the case of knowingly dishonest or fraudulent violations of clearly defined prohibitions.

At least, in that Act there was a specificity of the conduct outlawed where, if there was a knowingly and fraudulent violation, there could be a recovery in the courts—not by a multiplicity of attorneys general, or private auxiliaries, or treble damage actions, or class actions, but by an authorized agency of the United States.

I would think, without in any way prejudging the ultimate assessment of its merits, that an appropriate enforcement action by the Department of Justice, which could invoke broad equitable powers of the courts, might provide a more effective redress for hard-core antitrust violations, directly bilking the public, than title IV's antitrust overdose.

And so, in conclusion, for all of the foregoing reasons, GMA opposes title IV in its entirety and recommends further objective study by this

Committee, to alleviate its many legal defects and counterproductive implications for the public interest.

I should think that any "ill-gotten gains" by antitrust violators are already deterred, and should already be deterred by the risk of criminal antitrust felony prosecutions, 3-year jail sentences, heavy recoveries under existing treble damage procedures, without need for the new overkill of title IV.

Thank you.

[The prepared statement of Mr. Rowe follows. Testimony resumes on p. 28.]

PREPARED STATEMENT OF FREDERICK M. ROWE ON BEHALF OF GROCERY MANUFACTURERS OF AMERICA, INC.

My name is Frederick M. Rowe. I am a member of the law firm of Kirkland, Ellis & Rowe, and appear today in my capacity as General Counsel of the Grocery Manufacturers of America, Inc., whose members are manufacturers of grocery products located throughout the United States.*

I am convinced, and have so advised GMA, that Title IV of S. 1284, particularly as revised by the July 28, 1975 Committee Print, would expose GMA's members to greatly magnified legal liabilities under the antitrust laws, whose dimensions cannot yet be fully evaluated, and that Title IV as revised in the July 28 Committee Print would radically transform the existing application and enforcement of the antitrust laws.[1]

In my considered professional view, revised Title IV would represent the most far-reaching expansion in the nature of antitrust enforcement since the Clayton Act of 1914.

The Committee Print reflects a crucial transformation of the original proposal's aims to improve existing compensatory mechanisms to "injured" parties by antitrust treble damage actions under § 4 of the Clayton Act. Instead, the Committee Print creates a new statutory cause of action, authorizing State Attorneys General, and auxiliary private counsel, to utilize the federal judicial system via the Sherman Act as a vehicle for the transfer of "illegal profits" or monopoly "overcharges" from business firms to the States, for redistribution in unspecified ways under unidentifiable state laws or under undefined district court discretion. § 4C(c).

Moreover, the proposal would not only authorize the transfer and redistribution of "illegal profits" or "overcharges," but would penalize unforeseeable marginal as well as "hard core" Sherman Act violations. It compels mandatory awards to the states of triple the "damage" to their "general economy" or to individual state residents in the aggregate, without proof of either the fact or the amount of any individual injury, plus additional relief including attorneys' fees and unspecfied "other expenses of the litigation." § 4C(a)(1), 4C(a)(2), 4C(c)(1).

Such revolutionary expansion of antitrust liabilities and forfeitures would apply not only prospectively but retroactively, to pre-existing causes of action as well as to pending antitrust class actions for individuals of any kind, regardless of State interest or participation. § 405.

In my view, the serious ramifications of the July 28, 1975 Committee Print have *not* received the careful consideration warranted by the magnitude of their transformation of existing antitrust enforcement and liabilities—despite serious questions as to their political, legal, economc, social, and Constitutional implications.

As reflected in last week's monumental Supreme Court decision invalidating the enforcement powers of the Federal Elections Commission, serious Constitutional issues may be posed by a Congressional investiture of State Attorneys

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*I have served as Chairman of the Section of Antitrust Law of the American Bar Association, Chairman of the Council on Antitrust and Trade Regulation of the Federal Bar Association, Member of the American Bar Association Commission to Study the Federal Trade Commission, and Conferee for the Attorney General's National Committee To Study the Antitrust Laws. I have participated in many antitrust proceedings, including the defense of antitrust class actions.

[1] S. 1284, 94th Cong., 1st sess., Committee Print, July 28, 1975 [hereinafter "Committee Print"]. S. 1284 as originally introduced will be cited as "Original S. 1284."

General, who are not officers appointed pursuant to Article II of the Constitution, with the powers to enforce the federal antitrust laws and collect huge penalties and forfeitures.[2]

Indeed, for the reasons hereafter detailed, Title IV will not only fail to achieve its intended purpose, but may degenerate into a shakedown for corporations, a rip-off for consumers, and the great bicentennial money machine for antitrust entrepreneurs.

I. TITLE IV WOULD POLITICIZE ANTITRUST ENFORCEMENT BY GIVING 50 STATE ATTORNEYS GENERAL POWERS TO BANKRUPT BUSINESS FIRMS WITH MULTIPLE AND ASTRONOMICAL DAMAGE CLAIMS—FAR BEYOND THE POWERS OF THE U.S. DEPARTMENT OF JUSTICE.

Title IV's authorization to State Attorneys General, and their private auxiliaries, to file huge damage claims inevitably creates a grave potential for abuse of power and political reprisal.

To date, state officials have been confined to enforcing state antitrust laws and to filing federal antitrust claims for injuries sustained by the state in its proprietary capacity as a purchaser.[3] Title IV would magnify these powers by authorizing State Attorneys General and their private adjuncts to claim redress of "damages" both to the state's overall economy and to its residents, individually or collectively. § 4C(a)(1)(A) and 4C(a)(1)(B). Past antitrust claims asserted on behalf of such large classes have reached multi-million or even billion dollar dimensions.[4] Such a weapon in the hands of a State Attorney General, far beyond the enforcement powers of the U.S. Department of Justice, entails obvious risks of abuse.

The temptation for abuse and political grandstanding is plain. Whereas federal antitrust enforcement has been disciplined by a long and honorable tradition of professionalism in the Department of Justice, no comparable tradition exists at most state levels. Last month, a Fifth Circuit opinion observed that:

"In July of 1973, the State of Florida through its Attorney General commenced an *ambitious and highly publicized* antitrust action against seventeen major oil companies in federal district court."[5]

This complaint "alleged a worldwide scheme of anti-competitive activities in the production, transportation, refining, and marketing of petroleum and petroleum products."[6] Similar actions to break up oil companies have been filed by the Attorneys General of Connecticut, Kansas, and California.[7] Without prejudging the merits of these proceedings, despite an FTC Judge's recent recommendation for dismissal of a similar FTC oil industry break-up complaint by the FTC,[8] the potential for "ambitious and highly publicized antitrust action" against other business firms, claiming huge recoveries, is obvious.

The potential for excess mounts with the huge state-wide monetary claims authorized by Title IV. Even assuming supervision by a busy district court, § 4C (c)(2), the notion of a large fund, obtained through settlement or otherwise, administered by transitory state officials inexperienced in antitrust matters is troublesome at best. An antitrust honeypot in the statehouse or courthouse invites obvious risks of mismanagement or worse.

Such dangers are aggravated by the Committee Print's apparent authorization of contingency fee arrangements by state officials with private counsel. By redefining State Attorney General to include other "authorized" persons, § 4F(1), private antitrust counsel may presumably fly the flag of the state in filing antitrust actions on behalf of the state's general economy or residents.

In view of such arrangements' abuses, which have been stressed by judicial opinions, including the "conflict of interest" where private counsel's potentially

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[2] *Buckley* v. *Valeo*, __ U.S. __, 44 U.S.L.W. 4127, 4169 (Jan. 30, 1976). Notably, the Federal Food Drug and Cosmetics Act authorizes auxiliary investigations at the State level only by a state employee who is "commissioned by the Secretary as an Officer of the Department" of HEW under Article II. § 702(a), 21 U.S.C. 372(a) (1970 ed.).

[3] *Hawaii* v. *Standard Oil of California*, 405 U.S. 251 (1972); *State of California* v. *Frito-Lay, Inc.*, 474 F. 2d 774 (9th Cir. 1973).

[4] See citations infra.

[5] *State of Florida ex rel. Shevin* v. *Exxon Corp.*, 525 F. 2d 1372, 1373 (5th Cir. 1976) (emphasis supplied).

[6] Id.

[7] See In re Petroleum Products Antitrust Litigation, Dkt. 150, JPML (Jan. 21, 1976).

[8] Recommendation to Withdraw Complaint, In re Exxon et al., FTC Dkt. 8934 (Oct. 17, 1975), rejected by FTC (Oct. 18, 1975).

large legal fee aspirations dwarf the small individual interests of numerous claimants in the client class,[9] Title IV's authorization of such arrangements is highly questionable, especially considering the magnitude of the claims thus authorized. The prospect of state officials joining hands with private counsel as antitrust entrepreneurs to secure huge monetary recoveries under the aegis of the state raises questions which deserve most thoughtful reflection.

The Supreme Court's decision on federal election reform legislation recalls the pollution of large money floating in political waters.[10] Title IV's investiture of State Attorneys General, and their private adjuncts, with new federal powers to assert and collect huge monetary claims, surely deserves the most probing assessment, even assuming the best of faith by all concerned.

In view of such considerations alone, GMA opposes Title IV's concept of a State Attorney General acting as an antitrust money collector and entrepreneur, rather than as a state law enforcement official.

II. THE HISTORY OF ANTITRUST CLASS ACTIONS SINCE 1966 REFLECTS GREAT POTENTIAL FOR ABUSE, WHICH WOULD BE MAGNIFIED BY TITLE IV

The track record of massive antitrust claims, which will be broadened by Title IV, is marked by repeated court criticisms of pertinent class action abuses.

The Ninth Circuit castigated the abuse inherent in an antitrust class action asserting liabilities of $750 million in treble damages against 2,000 real estate brokers, jointly and individually. Per Judge Duniway, "The real bonanza in a case like this, if it is won, will go to counsel. * * * I venture to suggest that none of the class action features of this case was dreamed up by the named plaintiffs, but that all of them are the brain children of their attorneys. * * * I doubt that plaintiffs' counsel expect the immense and unmanageable case that they seek to create to be tried. What they seek to create will become (whether they intend this result or not) an overwhelmingly costly and potent engine for the compulsion of settlements, whether just or unjust. Most, though by no means all, real estate brokers are small business men. They cannot afford even to participate in such an action as this, much less to defend it effectively." *Kline* v. *Coldwell, Banker & Co.*, 508 F. 2d 226, 237–238 (9th Cir. 1974).

The Court of Appeals likewise denounced a class action claiming $80 million, i.e. $2.00 per claimant, based on an alleged conspiracy among 47 hotel chains and 600 hotels to increase room rates. Per the Court, "In view of the nonexistent, or miniscule, recoveries that are likely to accrue to the supposedly intended beneficiaries, it is not surprising that most of the named plaintiffs are attorneys acting as counsel for themselves . . . . [T]his action has been primarily generated and financially supported by the lawyers who possibly stand to realize astronomical fees, and not by the individuals whose potential claims in any event are de minimis. . . ." *In re Hotel Telephone Charges*, 500 F.2d 86, 91 (9th Cir. 1974).

Other courts have pointed to the "minuscule recoveries by [class actions'] intended beneficiaries while lawyers have reaped a golden harvest of fees."[11] And Judge Friendly has deplored the degeneration of large antitrust class actions into a vehicle for "blackmail settlements."[12]

Abuse aside, antitrust litigation is costly in any event. Even those cases which are settled are typically preceded by extended pretrial proceedings, discovery, and motions, eating up the resources of the parties at the high cost commanded by antitrust specialists in litigation where the stakes are high and errors may be fatal.[13]

At best, therefore, the new litigation authorized by Title IV would inflict the potential for more costly antitrust litigation for business firms, at the instance of State Attorneys General and their auxiliaries, imposing additional heavy cost burdens while cost/price inflation remains a real peril.

Significantly, many judicial safeguards which discipline abuses and protect against unmanageable litigation may be eliminated by the Committee Print. Thus

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[9] *Graybeal* v. *American Savings & Loan Ass'n.*, 59 FRD 7 (D. D.C. 1972); *Cotchett* v. *Avis Rent-A-Car System, Inc.*, 56 FRD 549 (S.D.N.Y. 1972).

[10] *Buckley* v. *Valeo*, supra, n. 2.

[11] *Free World Foreign Cars, Inc.* v. *Alfa Romeo*, 55 FRD 26, 30 (S.D.N.Y. 1972).

[12] Friendly, "Federal Jurisdiction: A General View" 120 (1973).

[13] For example, the litigation which culminated with *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), took 8 years and seven reported opinions: 41 FRD 147 (S.D.N.Y. 1966); 370 F. 2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967); *on remand*, 50 FRD 471 (S.D.N.Y. 1970); 52 FRD 253 (S.D.N.Y. 1971); 54 FRD 565 (S.D.N.Y. 1972); rev'd. 479 F. 2d 1005 (2d Cir. 1973); vac., 417 U.S. 156 (1974).

the original bill spoke in terms of judicial discretion to designate the State Attorney General as a representative of a "class," original S. 1284, 4C(a)(1), preserving the precedents and protective mechanisms in Federal Rule of Civil Procedure 23. Significantly, however, the Committee Print has deleted all references to "a class or classes" in State actions, 4C(a)(1), presumably ousting Rule 23 constraints and precedents which guard against harassment of business and inundation of the courts.

Accordingly, the type of antitrust class action denounced and dismissed by the courts as unmanageable, extortionate or tainted may gain new life under Title IV's State authorization.

Thus, will a State Attorney General, or District of Columbia Corporation Counsel, refuse an offer by private antitrust counsel to file suit, on a contingency basis at no cost to the state, to collect massive "overcharges" or "illegal profits" from antitrust malefactors, large or small? State officials willing, the 600 hotels or the 2,000 real estate brokers targeted for multi-million liabilities in the antitrust class actions dismissed as oppressive by the Ninth Circuit could be revisited on a contingency fee basis, at no expense to the state, and with the possibility of a substantial settlement, plus attorneys' fee and "other expenses," § 4C(a)(2), benefiting the state and the lawyers.

Actually, since many large companies have developed a hardnosed refusal to settle specious antitrust class actions and have gained expertise in the successful defense of flimsy antitrust litigation, less experienced smaller firms or individual providers of services, such as real estate brokers, may become the most conspicuous victims.

For example, the FTC recently sued the American Medical Association for price fixing of doctors' services due to solicitation or advertising restrictions under the "Principles of Medical Ethics."[14] With health care costs having gone through the roof, would not a Title IV case against thousands of doctors be attractive to a State Attorney General or D.C. Corporation Counsel, if offered by enterprising lawyers on a contingency fee basis, with the doctors as co-conspirators subject to contingent antitrust liabilities running into the millions, individually and jointly? On top of the malpractice litigation diaster, doctors might seek sanctuary as an endangered species.

Notably, the antitrust claims authorized by Title IV for treble damage recoveries plus attorneys' fees are not confined to price fixing conspiracies or so-called "hard core" or per se antitrust infractions, but range the broad sweep of the Sherman Act's generalities. As perceived by Assistant Attorney General Kauper, Title IV's overkill may hence inflict staggering liabilities for marginal antitrust violations under unforeseeable shifts of interpretation of the Act's vague prohibitions.[15]

Even the proponents of the abortive 1970 consumer class action proposal, S. 3201, acknowledged the need for specifying particular activities as unlawful prior to creating harsh legal exposures.[16]

With the vastly enlarged liabilities inflicted by Title IV, no conceivable justification exists for authorizing devastating claims based on the vague generalties of the Sherman Act, imposing treble forfeitures for unforeseeable infractions, and making such treble damage assessments mandatory on the courts, coupled with attorneys' fees and "other expenses of litigation."

Former Chief of the Antitrust Division Professor Donald F. Turner has recently stated that, in view of the private treble damage cases ranging from "the weak to the frivolous," he "would probably recommend against including a private right of action" if the Clayton Act were to be written today.[17]

In light of the dubious history of antitrust enforcement by private treble damage class actions, therefore, a radical expansion of such actions, via State Attorneys General, appears highly questionable.

III. NO SUBSTANTIAL BENEFITS TO CONSUMERS OUTWEIGH THE GRAVE POTENTIAL FOR ABUSE, AND ECONOMIC AND SOCIAL COSTS OF TITLE IV OVERKILL

In coping with antitrust class actions in the past, courts have noted that the prospects of substantial recoveries by individual consumers were remote.

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[14] FTC Dkt. 9064, Dec. 19, 1975.

[15] Hearings on S. 1284 before the Subcommittee on Antirtust and Monopoly of the Senate Judiciary Committee, 94th Cong., 1st sess., p. 94 (1975) [hereinafter "Senate hearings"].

[16] See S. 3201, 91st Cong., 2d sess., as reported by the Senate Commerce Committee. Senate Report No. 91-1124 (1970), title II, sec. 201(1).

[17] 747 BNA ATRR, p. A-18 (Jan. 20, 1976).

Thus, the courts have denounced an $80 million class action based on a $2.00 per individual claim for alleged hotel service overcharges, dismissing a case against 47 hotel chains and 600 individual hotels.[18] Likewise, a $9½ million class action, seeking $1.00 per claimant based on car rental surcharges, was dismissed, with the court stressing the abuse of such actions benefiting principally the lawyers.[19] Similarly, the Court of Appeals dismissed as specious a class action on behalf of 125 million people claiming 375 trillion dollars plus $3 million attorneys' fees, against automobile manufacturers.[20] Actually, in such actions, most of the members of the consumer class may not even wish to participate, if given the option.[21]

The heavy burdens of costly litigation, even if resulting in settlements, will ultimately be carried by consumers in the form of higher prices, aggravating inflationary burdens. According to the Avis court, in a claim attacking a $1.00 overcharge in car rental fees on behalf of 1,500,000 class members, "individual members of the class are unlikely to receive any significant personal benefit from a successful prosecution of this suit and, indeed, may ultimately have to pay for it through subsequently increased costs of car rental." [22]

Moreover, the costs of massive antitrust litigation are heavy, at best. In cases where large financial interests are at stake, and the risks of error may be fatal, retention of experienced antitrust litigation counsel by both sides creates substantial cost burdens. Such burdens are not eliminated by settlements, since such settlements typically come about only after protracted and costly pretrial proceedings, including prolific discovery and complex motions.

The courts perceive that the real parties in interest in massive antitrust class actions are the lawyers. One district court noted the "miniscule recoveries by its intended beneficiaries while lawyers have reaped a golden harvest of fees," [23] other courts have denounced the "contingent fee syndrome," and another cited the Italian proverb that "A lawsuit is a fruit tree planted in a lawyer's garden." [24] Contingent fee awards of $5 million in a $22 million settlement and $2.2 million in a $26 million settlement have been recorded. [25] Understandably, one illustrious class action specialist told this Committee that class actions "become so lucrative to some lawyers they kind of leap into the thing; so lucrative that they will not take any other kind of actions." [26]

In view of the severe criticisms expressed recently by the Courts of Appeals for the Ninth [27] and Second Circuits,[28] the further expansion of such actions by Title IV becomes highly suspect.

For, rather than benefiting consumers by substantial redress for economic injuries, such actions may mostly enrich the lawyers, for plaintiffs and for defendants alike.

Apart from such economic considerations, the social costs of proliferating massive antitrust litigation are substantial.

Many courts have deplored the intolerable burdens of such litigation on the judicial system. Weeks ago, a Pittsburgh district judge reported the judiciary's "increasing disenchantment" with antitrust class actions, which had become a "serious drag upon judicial functions." [29] A New York district judge dismissed an antitrust class action for fear it would immobilize "for years to come the federal judicial personnel involved." [30] Judge Friendly of the Second Circuit lamented the

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[18] In re Hotel Telephone Charges, 500 F. 2d 86 (9th Cir. 1974).

[19] *Cotchett* v. *Avis Rent-A-Car System, Inc.*, 56 FRD 549 (S.D.N.Y. 1972).

[20] *Heart Disease Research Foundation* v. *General Motors Corp., et al.*, 463 F. 2d 98 (2d Cir. 1972).

[21] See, e.g., *City of Philadelphia* v. *American Oil Co.*, 53 FRD 45 (D. N.J. 1971) (only 3 percent of 21,000 "consumer" class members notified filed claims; only 1,700 ever responded).

[22] Cotchett, supra, n. 19 at 554.

[23] Free World Foreign Cars, supra, n. 11 at 30.

[24] *Illinois* v. *Harper & Row Publishers, Inc.*, 55 FRD 221 (N.D. Ill. 1972).

[25] *Lindy Brothers Builders, Inc. of Philadelphia* v. *American Radiator & Standard Sanitary Corp.*, 341 F. Supp. 1077 (E.D. Pa. 1972); *Philadelphia Elec. Co.* v. *Anaconda American Brass Co.*, 47 FRD 557 (E.D. Pa. 1969), analyzed in Amicus Brief for American College of Trial Lawyers, p. 21, in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).

[26] Joseph Alioto, Senate Hearings, p. 359.

[27] *Kline* v. *Coldwell*; In re Hotel Telephone Charges, supra.

[28] *Eisen* v. *Carlisle & Jacquelin*, 479 F. 2d 1005 (2d Cir. 1973); cf. *Lefrak* v. *Arabian American Oil Co.*, F. 2d (2d Cir., Dec. 12, 1975), No. 75-7234 et al., 745 BNA ATRR D-1, Jan. 6, 1976.

[29] *Stavrides* v. *Mellon National Bank and Trust* (W.D. Pa. No. CA 72-242, Nov. 25, 1975), 1975-2 Trade Cas. para. 60, 662.

[30] *Schaffner* v. *Chemical Bank*, 339 F. Supp. 329, 337 (S.D.N.Y. 1972).

degeneration of class action procedures into an engine for "blackmail settlements." [31]

Infliction on the judicial system of additional massive antitrust litigation is now uniquely untimely, with mounting case backlogs slowing civil and criminal trials due to inadequate judicial resources. Chief Justice Burger's 1975 State of the Judiciary message pointed to the "crisis" in the administration of justice "particularly in the larger districts" due to inadequate judicial resources.[32]

This court "crisis" must be viewed in the context of the dramatic rise of civil antitrust litigation in the federal system. Thus, 1431 civil antitrust actions were filed in 1975, up 50 percent from 929 actions in 1970. Even more strikingly, 190 reported antitrust class actions alone were filed in 1975, up over 60 percent over the 114 class actions filed in 1974, mostly in judicial districts with growing civil or criminal case backlogs.

In sum, amid a mounting crime and court "crisis," due to inadequate judicial resources, it appears questionable to choke the judicial system with more massive antitrust litigation, which can only aggravate the coming crunch of the Speedy Trials Act of 1974 in processing criminal cases in the federal system.

IV. PARADOXICALLY, SMALLER BUSINESS FIRMS MAY BE THE GREATEST LOSERS OF TITLE IV ENFORCEMENT

Perversely, monster antitrust litigation may disproportionately victimize smaller business firms rather than the corporate giants.

Many large firms, based on litigation experience, have developed an expertise to cope with antitrust treble damage litigation, and a policy against encouraging flimsy litigation by easy settlement of specious claims. Also, the risk of potential liability for a giant firm, albeit substantial, may sometimes be relatively tolerable, so as to justify a decision to litigate a large claim notwithstanding the inherent uncertainties of antitrust litigation before juries applying shifting and elusive antitrust principles. (Of course, the consumer pays, through higher prices.)

By contrast, a smaller firm, charged as an antitrust co-conspirator with joint and individual liability for an alleged industry-wide conspiracy, may be unable to stand the risk of a potentially astronomical exposure. Understandably, the $750 million potential liability of each of 2,000 real estate brokerage firms "shocked the conscience" of the Court of Appeals. As the court stressed, "the small individual operator faces a potential liability of upwards of three-quarters of a billion dollars for which all of his or her assets are responsible. The amount of a recovery in a lawsuit is not ordinarily of concern where a wrong has been inflicted and an injury suffered. But when 2,000 are joined in an action where each is jointly and severally liable, the liability is increased in geometric progression. Such an award against each of 2,000 real estate broker defendants would shock the conscience." [33]

Such litigation is inherently conducive to the "blackmail settlements" denounced by Chief Judge Friendly, since smaller defendants faced with staggering exposures often cannot carry the risk or the costs of an effective defense.

The prevalence of settlements in massive antitrust class litigation becomes understandable. One expert testified that "99% of these cases get settled." [34] And in the same 1970 hearings Senator Sam Ervin sagaciously observed:

"In the antitrust field . . . many people agree to a settlement because it is cheaper to reach a settlement and pay certain sums of money than it is to litigate. . . . I know many cases that are settled because it is cheaper to settle them, cheaper to buy your peace, than it is to seek justice. I have recommended that to clients many times myself." [35]

Indeed, the vulnerability of smaller firms to "blackmail settlements" has generated the class action litigation tactic of joining many smaller firms, such as dealers, as patsy defendant co-conspirators, with larger manufacturer defendants. Unable to afford a real defense, these patsy defendants readily accept

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[31] Supra n. 12. See also Simon, "Class Actions—Useful Tool or Engine of Destruction," 55 FRD 375, 388–92 (Remarks delivered to Ninth Circuit Judicial Conference, July 27, 1972).

[32] Chief Justice Burger, "The State of The Judiciary—1975," 61 ABAJ 439, 443 (April 1975).

[33] *Kline* v. *Coldwell, Banker & Co.*, 508 F. 2d 226, 237–238 (9th Cir. 1974).

[34] Hearings on S. 3201 before the Senate Judiciary Committee, 91st Cong., 2d sess. p. 112 (1970) (Harold Kohn testimony).

[35] Id., pp. 116, 118.

small seriatim settlement offers, which build a kitty to finance further litigation against the main defendants.

A further imposition on the smaller firm is the potential impact of a large outstanding "contingent liability," due to antitrust litigation, on its access to necessary financing and capital. SEC regulations impost strict requirements to disclose contingent liabilities of a "material" nature in financial statements, for the protection of the investing public. These disclosure requirements have led to corporate auditors' insistence upon legal opinions by counsel as to the degree and amounts of contingent liabilities arising from pending litigation.

Without some definitive assurance against outstanding "material liabilities" arising from litigation, a company may receive only a "qualified" auditor's report. With "problem banks" making risky loans in the public eye, the access to financing by the smaller firm, already less attractive to lenders than a corporate giant, may be further limited. In short, failure to present a "clean" auditor's report due to large outstanding contingent liabilities from massive antitrust litigation, whose outcome is inherently impossible to predict with certainty, may well inhibit access by smaller firms to capital markets, or raise their financing costs.

The lesser ability of smaller firms to carry the risks of huge co-conspirator damage exposures, therefore, paradoxically favors corporate giants and may increase "concentration."

Above all, Antitrust Division Chief Kauper and Ralph Nader have noted Title IV's potential for bankrupting smaller firms.

Mr. Kauper expressed his concern to this Committee with the "very serious problems with the specrte of massive recoveries based upon unquantifiable and perhaps totally unforeseeable damages multiplied by three. In addition, of course if the worst would come to pass, the possibility would arise of damages on a scale wholly unrelated to the wrongdoer's gain that would result in significant impairment to the viability of those firms from whom such damages were recovered. Such a result in itself could have anticompetitive consequences, since only the largest firms involved in a given violation might survive the financial pressure of such damage awards." [36]

Even Mr. Nader disapproved of treble damages for injury to a state's "general economy" since "unexpected liability when trebled could easily bankrupt culpable local or State firms." [37]

Of course, larger firms may also face disaster if targeted for massive antitrust exposures. For example, retail grocery chains have large sales volume, with relatively low net profits. Yet weaker companies, like A&P, are currently subject to massive damage exposures by multiple cattlemen's antitrust actions. For even a larger and vigorous company, let alone a vulnerable giant, the potential holocaust of a treble state-wide antitrust damage exposure may be financially disastrous.

Overzealous pursuit of monopoly "overcharges," therefore, could well boomerang by victimizing particularly the smaller or weaker enterprise, while benefitting the lawyers rather than the consumer.

V. CRITICAL PROBLEMS IN TITLE IV, AS REVISED BY COMMITTEE PRINT, REQUIRE CAREFUL CONSIDERATION TO PERMIT RATIONAL AND INFORMED LEGISLATIVE JUDGMENT

The Committee Print reflects S. 1284's transformation from the principle of aggregate compensation for individually "injured" persons under Clayton Act § 4, to the principle of monopoly "overcharge" and "illegal profits" confiscated by the States, conditioned on redistribution to residents—creating a "new statutory cause of action" on behalf of the state and a "new substantive antitrust claim." [38]

Significantly, in light of testimony suggesting such modifications to prevent judicial obstruction of such a broad legislative intent, the Committee Print has deleted prior references to Section 4 of the Clayton Act as to suits by the State Attorneys General, which requires "injury" as an element of a private treble damage cause of action.[39] Apparently for similar reasons, the Committee

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[36] Senate Hearings, p. 94.
[37] Id., pp. 141, 150.
[38] Id., pp. 336, 370, 478–82, 691.
[39] Cf. original S. 1284, sec. 4C(a).

Print has deleted references to "parens patriae,"[40] since this concept might also have been construed by courts to inhibit the bill's quest to recapture "illegal profits" and "overcharges."

But substantial Constitutional problems may arise from such a "new statutory cause of action" under the Sherman Act, enforceable by a State Attorney General or his private auxiliary, which at least require examination. Only last Friday, the Supreme Court invalidated the enforcement functions of the Federal Elections Commission, and interpreted Article II, § 2, cl. 2 of the Constitution as limiting authority to enforce federal statutes, by litigation in the federal courts, to officers duly appointed pursuant to that Article.[41] Careful study of the legal implications of that Supreme Court decision may reveal the Constitutional infirmity of Title IV's authorization of a "new statutory cause of action" with forfeitures and penalties to be enforced by federal court litigation brought by a State Attorney General, or his private adjunct, not appointed by the President, above and beyond the antitrust enforcement authority previously reposed in the Attorney General of the United States.

In short, the Supreme Court's landmark decision at least requires thoughtful consideration—particularly when a State Attorney General, the newly proposed Congressional repository of antitrust enforcement authority, may sue to collect treble damages and forefeitures of a quasi-penal nature *not* commensurate with any actual "injury" sustained and proved as a basis for recovery.

Other Constitutional infirmities of Title IV have also received no substantial consideration. The deprivation of the right to a jury trial under the 7th Amendment as to each individual claim asserted against a defendant has been noted in the hearings, without definitive answer. And the potential for unconscionable penalties by ruinous treble damages for unforeseeable liabilities, based on a vague "new substantive antitrust" cause of action map pose substantial constitutional questions, above and beyond the plain Constitutional vulnerability of the retroactive application of such penalties by § 405. Such Constitutional issues may be aggravated by the exposure to such new and unfathomable liabilities by business firms which are already expressly subject to recently stiffened criminal penalties of up to three years imprisonment and heavy fines for Sherman Act "felonies."

The Constitutional dilemmas posed by the Committee Print revision of Title IV would indicate, at the very least, an authoritative legal opinion by the Attorney General, or other impeccable legal authority, to avert a legal fiasco for this Committee and for the Congress.

Furthermore, the interaction of Title IV with Federal Rule 23 is steeped in confusion. As suggested by Assistant Attorney General Kauper, this "interaction" deserves serious scrutiny, and an assessment of Rule 23's operation is plainly in order.[42] Possibly, the Committee Print's deletion of references in classes in § 4C(a)(1) may reflect a purpose to rule out the application of Rule 23. But inasmuch as the Committee Print purports also to apply "in any class action on behalf of natural persons," aside from actions by the State Attorney General, § 4C(c)(1), § 405, some clarification of Rule 23's applicability appears essential.

Furthermore, the Committee's record is devoid of input by the judiciary or consideration by the Committee as to the judicial resources necessary for S. 1284's implementation.

Particularly in view of Chief Justice Burger's 1975 State of the Judiciary address noting the "crisis" in the "larger districts" (where masssive antitrust class actions are often brought), and Administrator Kirks' July 23, 1975 suggestion that the moving proponents of such legislation undertake an assessment of its burdens on the courts, the absence of such consideration by this Committee is striking. Indeed, the American College of Trial Lawyers expressly recommended in July 1975 that this Committee obtain such advice by the Judicial Conference of the United States.[43] This would seem essential to an authoritative legislative judgment as to the soundness of Title IV, and its absence is inexplicable.

The lack of such advice by the Judiciary as to the impact of Title IV is particularly noteworthy since, in the context of comparable consumer class actions proposals in 1970, the late Chief Judge Murrah and Administrator Kirks pre-

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[40] Cf. original S. 1284, secs. 4C(a)(1), 4C(a)(2), Senate Hearings, pp. 480–82.
[41] See references, supra, n. 2.
[42] Senate Hearings, pp. 93–94.
[43] Id., p. 521.

sented helpful and authoritative testimony to this Committee—with Judge Murrah stressing that "class actions" by "enterprising attorneys" can "really breed chaos in the courts." [44]

Indeed, the utter absence of inputs from the Judiciary as to the courts' relevant experience with massive antiturst litigation can only stultify the basis for any informed deliberations by the Senate as to the public interest implications of Title IV.

Finally, the Committee record to date contains no assessment of the inflationary impact of fomenting new and costly antitrust litigation. It contains no cost/benefit analysis of the most minimal sort to support a reasonable legislative decision. It contains no assessment by the Congressional Budget Office of options for a potentially more efficient and less wasteful "delivery system" of benefits to consumer.

Assuming some merit in Title IV's apparent objective of transferring "illegal profits" and "monopoly overcharges" from corporate malefactors to victimized consumers, surely some examination of the efficiency of the chosen instrument to achieve such results would be in order. Apart from Title IV's other defects, its choice of inherently costly and wasteful antitrust litigation in the federal courts as a "delivery" mechanism for social benefits appears dubious at best, and at least deserving of comparative study with rational alternatives.

At a minimum, such a study would include evaluation of mechanisms, comparable to the FTC Improvements Act of 1975, authorizing FTC civil actions "to redress injury to consumers" for knowingly dishonest or fraudulent violations of clearly defined prohibitions, including monetary refunds and damage payments.[45] Appropriate enforcement actions by the Justice Department, invoking broad equitable powers of the courts, might provide more effective redress for hard-core violations directly bilking the public than Title IV's antitrust overdose.

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CONCLUSION

For all of the foregoing reasons, GMA opposes Title IV in its entirety,[46] and recommends further objective study by this Committee to alleviate its many legal defects and counter-productive implications for the public interest.

Any "ill-gotten gains" by antitrust violators are already deterred by the risk of criminal antitrust felony prosecutions, jail sentences, and heavy recoveries under existing treble damage procedures, without need for the overkill of Title IV.

Senator HRUSKA. Mr. Rowe, you mentioned the lawsuit attacking the price fixing by doctors under the provisions of title IV. Just how would such a lawsuit work? What are the mechanics of it?

Mr. ROWE. Well, I will try to anticipate, to the extent I can, how this would go. As I pointed out last December, the Federal Trade Commission brought a complaint charging, as an unfair method of competition, the nonsolicitation and nonadvertising restrictions of the principles of medical ethics, as leading to price fixing for the price of medical services.

So, therefore, an enterprising lawyer need not dream up a cause of action; the outlines of that cause of action he could, in essence, copy from the complaint which the FTC filed last month, and which, needless to say, is very far, very far from any adjudication as to the merits.

So let us assume that the merits are highly speculative. Such a lawyer could file, if he were to secure the authorization of a State attorney general, which title IV would presuppose, or if he could secure the authorization of the corporation counsel of the District of Columbia,

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[44] Hearings on S. 3201, supra, n. 34 at 166.

[45] Public Law 93–637, sec. 206(a).

[46] GMA is also opposed to sec. 704, which would eliminate critical prerequisites established for decades to prove unlawful "attempt to monopolize" under sec. 2 of the Sherman Act, a criminal provision, without any justification for such a radical and probably unconstitutional change.

who expressly is named in title IV as a source for the bringing of actions to recover for damages sustained by the general economy or residents.

Now, if he is authorized by the corporation counsel, or the State attorney general, he can then sue, presumably, on behalf of the District of Columbia, or on behalf of the State.

Why would the District of Columbia corporation counsel or the State attorney general be interested in this? Well, I would expect the enterprising lawyer to be able to represent that this action would cost nothing, or would cost very little to the District of Columbia, or to the State, because he would undertake it on a contingency fee basis.

That has been common practice in antitrust class litigation in the past. And so, therefore, he would sue, and he could plead that the individual doctors who, let us say, were members of the American Medical Association, or the local chapter of the American Medical Association, who subscribe to these principles of ethics, were coconspirators fixing the price for medical services in the State, or in the District of Columbia, and that this was illegal price fixing under the Sherman Act.

Now, the complaint then would charge as coconspirators these doctors, individually and collectively, and they would have joint and several liability as charged.

This would be comparable to the real estate brokers in California in the *Kline* case which I previousy outlined in my testimony earlier.

Now, let us assume, in the District of Columbia—roughly, a million or so people, if you include some of the suburbs—the suit then could be brought on behalf of a class of 1 million people or less who are consumers of medical services in the District and its surroundings. I understand here there may be of the magnitude of 3,000 or 4,000 doctors; I don't know how many are members of the American Medical Association, but they could be coconspirators and defendants, like the real estate brokers.

Each of them, at the time the suit was brought, would have outstanding a contingent liability. If you assume that the alleged overcharge in medical services due to the alleged price fixing, would be of the order of, let us say, $10 per patient, you could have up to 1 million people, each claiming a $10 alleged overcharge. So you would have a $10 million exposure as a contingent liability, times three, treble, because you would be suing for treble damages.

So this liability would sit on the doctors individually and collectively, as a contingent liability. Now what the ramifications of that would be on a doctor if he wanted to, let us say, buy some real estate or a place on the eastern shore, and apply for a bank loan and had this kind of contingent liability outstanding, I would not venture to predict, but I would say he might have a large amount of problems, understandably.

Now, I would say that would be a very serious problem, if this kind of litigation were authorized by title IV, and I have no reason to doubt that that would be the kind of action that could be brought.

Now, what would happen to the court? Let us assume the suit were brought in the District of Columbia. Well, then, the District of Columbia might have to give notice to the people in the District who were

users of medical services, whereby they could opt out, or somehow disassociate themselves from the action.

As the bill provides, actual notice is not a prerequisite, but notice by publication is permitted so long as the judge does not disapprove of that as being an inappropriate method.

Well, if that is the case, then, possibly one morning, in the Washington Post, I do not know on page what, one would have to see that this suit was announced, and he could then write in and count himself out; or maybe there would be an announcement on WETA, or WTOP, I do not know what, because one of the changes made by this bill is the elimination of the requirement of actual, individual notice to each known class member, which the Supreme Court established as necessary in the *Eisen* case.

So, this suit would then go on, and the individual resident of the District of Columbia who uses medical services, would have himself in or out.

These are just some of the procedural preliminaries before one ever would get to the merits.

I am expressing no prejudgment whatsoever as how the lawsuit would come out on the merits. I have no way of making, and I would not care to make, any kind of prediction along these lines; and I would dare say it would take quite a while for the FTC lawsuit to be resolved. But I think this is the way the thing would apparently be launched, as I understand the provisions of title IV.

Senator HRUSKA. How would recovery be distributed under title IV?

Mr. ROWE. I have great problems with that, Senator, because I think one of the unexplored questions is really what would happen to what has been called by some, the so-called pot of gold, and I guess I called the honeypot, that would arise if there were a settlement, or if there were a substantial recovery by way of litigation.

What I see in the proposal, it says: "The court shall distribute or direct the distribution of monetary relief as the district court may, in its discretion, authorize, or in accordance with State law." So, from that, I cannot tell how this would happen. I do not know whether one would write in, or check in, or report down there, to collect his amount, and I do not know how the amounts would be calculated. I do not know how the amounts would be apportioned, and I do not believe anyone knows, or can know, from the provisions of title IV. I think this is entirely speculative at this point.

I know some of the proponents, in the hearings, have referred to the *Tetracycline* litigation, where there was a settlement fund of close to $200 million, that was apportioned, as some kind of precedent for the procedures here.

But that was a unique case; there was no question of a litigation as to the merits, because the defendants settled and, in effect, dedicated that fund to be apportioned out, and in a sense, washed their hands of it. I should add also, the defendents subsequently were acquitted in the trial—in the retrial on the merits of the charges. But they put that pot aside and let it be distributed out, more or less as the various counsels for the various interested classes of plaintiffs, allocated out among themselves in court.

Mr. Kelley, the attorney general of Michigan, stated, even though he benefited on behalf of the State of Michigan from this, that there

were distribution problems in some States; but I would say, in any event, the experience of this one case, the *Tetracycline* case, certainly gives very little assurance that the total void in title IV, as to how this should be done, can result in anything but chaos until it is spelled out more carefully than it has been done to date.

Senator HRUSKA. Mr. O'Leary, do you have any questions?

Mr. O'LEARY. Thank you, Mr. Chairman. Mr. Rowe, are you saying if doctors have fixed prices and if consumers have been injured——

Mr. ROWE. I am not saying that at all.

Mr. O'LEARY [continuing]. That those consumers that have been damaged should not be able to recover?

Mr. ROWE. Well, first, Mr. O'Leary, let me be quite clear that I did not state, or imply, or insinuate, that doctors have fixed prices.

All I have said is, the FTC has brought such a case, and based on the complaint by the FTC, which is very far from adjudication, a private counsel could file a similar complaint, as authorized by title IV, with authorization by the District of Columbia corporation counsel, or a State attorney general, and duplicate that cause of action, period.

Now, I do not know whether that answered your question, because I may have misunderstood your question in trying to make clear I was not accusing anyone of violating the Sherman Act.

Mr. O'LEARY. Neither am I, Mr. Rowe, but let us assume for a minute that doctors have fixed prices. Is it your testimony that it is sufficient for the Department of Justice or someone else to file a criminal price fixing against those doctors who were involved? And that that should be the end of it? That those consumers who suffered damages should not be able to recover the damages they suffered by virtue of the price fixing?

Do the difficulties of managing such a suit and distributing the proceeds and all the rest that you have alluded to in your testimony——

Mr. ROWE. Well, if you are saying, Mr. O'Leary, whether a consumer, or a group of consumers, should not have the right of recovery for injuries sustained by them, arising out of a violation of the antitrust laws, I am not saying that at all.

Let us get away from doctors for a moment, because there may be questions of Sherman Act application to the learned professions, and I think this would be a bad example to probe further because of that.

But let me use another example: Let us use barbers. That particular question does not exist as to barbers, so far as I know. Now, if barbers got together in the District of Columbia and fixed the price of haircuts at $5, and you or I went to get a haircut next week and, by reason of that price fix, we paid $2 more for a haircut, I would certainly say that you should have a cause of action under the antitrust laws, which would reach that kind of per se violations to sustain injury to your pocketbook, which you would sustain the next time you get a haircut.

Mr. O'LEARY. Mr. Rowe, would you agree that the contingent liability is just one of many factors which may or may not affect the firm's ability to raise capital?

Mr. ROWE. Oh, very much so. I was speaking of the incremental marginal burden on a firm, above and beyond its other limitations.

For example, everyone knows that bankers are conservative, and I think, by reason of recent publicity, they will be tending to, perhaps,

be even more conservative, because the problem of "problem banks" has been very much in the public eye recently.

And so, if a bank has a choice of, let us say, making a loan to General Motors, or making a loan to a smaller firm, let us say, a company that makes macaroni and has $20 million sales per annum, it may inherently have a preference for the larger firm, just because it may be a safer loan.

What I am saying is that if there is a lawsuit against, let us say, IBM, claiming large liabilities, and IBM goes to get a loan, IBM's bankers may blink less if IBM tells them; "We have five more antitrust cases that we were hit with in the last six months," then if a small macaroni company goes to its bank and says.

I have just been named as a co-conspirator together with six other companies, and maybe five distributors, and the claim against me, individually and jointly, is $60 million trebled; and I know I am innocent, but my lawyer cannot guarantee me that I will win the case, because he says the antitrust laws are confusing.

I think the $20 million macaroni company may be marginally burdened more than the IBM type of company, in securing financing.

Mr. O'LEARY. Firms do go to the market everyday, and they reveal in their prospectus, the existence of antitrust treble damage suits against them, and still are able to raise capital, are they not?

Mr. ROWE. They may, and they are, and I cannot give you the statistics on it, Mr. O'Leary. I wish the committee had that information before it, because I think it would make for a more informed deliberation by the committee as to what I consider to be a real peril of this legislation.

But I will tell you, from my own personal experience, and I regret that I cannot name the company because it is pending litigation—that this company, which was a medium size company, that is, in $100 million range, had severe problems in receiving necessary bank financing because of an outstanding contingent liability in an antitrust treble damage action of $90 million.

Because of these difficulties, it settled its case for a substantial payment of several million dollars, not because it felt that it did not have a meritorious defense, but in substantial part, because it could not stand that kind of contingent liability overhanging it, in view of the representation made to it by its bankers, who told the company: "Settle the case."

Mr. O'LEARY. Mr. Rowe, I have a prospectus in front of me from the Upjohn Co.[1]—$125 million in 8⅛-percent notes—at page 30 it reveals the existence of a suit which supports antitrust claim, seeks damages in excess of $750 million.

I have some other prospectuses which I would like to submit for the record, Mr. Chairman, but despite suits in these rather sizable sums, firms are able to raise money when they go to the market and disclose these contingent liabilities, are they not?

Mr. ROWE. Oh, I assume the Upjohn Co., in Kalamazoo, Mich., I believe is where they are, is a sound company, and that if it has financial resources, and is sound in its capital position, I have no doubt that the banks will look favorably on Upjohn.

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[1] See excerpt prospectus, p. 476.

My point is not, Mr. O'Leary, that the moment the Congress were to authorize title IV—if that, to me, sad and disastrous day should ever come—that the next morning, everyone would go out of business and people would be jumping out the windows in Wall Street because the money flow would dry up.

What I am saying, Mr. O'Leary, and I think it is very valid and a very important economic consideration, is that, to the extent the Congress loads onto the smaller firm an additional burden, and this being the greater burden of securing financing by reason of substantial outstanding contingent liabilities, that this not only would be unfair and unjust, but very paradoxically would be counterproductive to the very aims of at least some of the sponsors of this legislation to combat concentration.

What could more easily foster concentration if the smaller firm takes the biggest gaff out of this legislation?

Certainly, IBM's financing ability will be diminished in a much lesser degree than the financing of the 2,000 real estate brokers who were victimized in this case in the ninth circuit, where the court found it to be unconscionable that contingent liabilities of $750 million were loaded on to each of those real estate brokers, individually and jointly, as coconspirators.

I think it is important, Mr. O'Leary, to realize this problem of coconspirators. It is very easy to assume, in this kind of legislation, that a monopolist overcharges and profiteers, with images of Herblock cartoons of people sitting there with top hats and bags of money, and that taking this away to give to the hollow-cheeked victimized consumer is a noble thing.

And maybe, in theory, something may be said for that, but in reality, these litigations are not only against IBM; these lawsuits were against 2,000 real estate brokers in the Los Angeles area.

These suits can be brought against 3,000 doctors in the District of Columbia; these suits can be brought against Chevrolet dealers.

These suits do not limit themselves to giants. Everyone, everyone in the business community is a potential antitrust defendant.

And as I pointed out, it is tactically, perhaps, smart, for treble damage attorneys to join in with some of these small people as coconspirators in the case, because these small companies cannot afford to litigate; they cannot pay the legal fees. They are much easier to get settlements from, and if you had a series of settlements from small people who are coconspirators, who cannot stand a contingent liability of several tens or hundreds of millions of dollars, you can collect that money as a kitty to fight the rest.

Mr. O'Leary. Mr. Rowe, with respect to contingent fees, is it not a fair statement to say that, in recent years, the courts have done a pretty good job of supervising the fees paid to the plaintiff's lawyers in antitrust cases?

Mr. Rowe. Well, Mr. O'Leary, I have no really fully informative statistical basis for making that decision, and so, I cannot give you an authoritative answer.

I do know that there have been reported and recorded cases approving very large contingency fee settlements—contingency fee awards, based on settlements without litigations. I have no brief against, and

no wish to curtail the professional opportunities of my brethren in the plaintiff's bar—that is not my point.

My point is that the costliness of this litigation, which results from the heavy burdens of litigating antitrust cases and paying lawyers both for plaintiffs and for defendants, and the high cost of settlements, and the high costs of the contingency fees, create a burden on the intended beneficiaries of this legislation, for which they will have to pay in one form or another.

I do note, in direct response to your question, that the report by the House Judiciary Committee has added an expressed prohibition on contingency fee arrangements. That kind of prohibition against contingency fee arrangements, which I would certainly urge upon this body to consider very seriously, has notable advantages in several ways.

One, as was pointed out by the committee of the House, if the intended objective of the bill is to develop a know-how and an expertise and a professionalism in State attorneys general to enforce the antitrust laws, which is certainly a worthy objective, that kind of incentive to professionalism would be undermined if there is this reliance on contingency fee arrangements with private counsel.

And I, of course, have also pointed, not to my personal, but to the judiciary's repeated and vehement denunciation of the contingency fee syndrome in antitrust litigation, and I would defer, really, to what the courts have said about this subject, rather than what I individually might opine.

Mr. O'LEARY. You are familiar with the case *City of Detroit* v. *Grinnell Corp.*, I am sure?

Mr. ROWE. I have read about it, yes.

Mr. O'LEARY. The plaintiff's lawyer in that case sought a fee of $1.5 million out of a settlement of $10 million, and the court of appeals said: "Too much," and told the district court to go back and hold an evidentiary hearing.

And the court took into consideration such things as the number of hours spent, complexity of the case, risk, whether or not there was a prior judgment by the Government in this case, all those factors are taken into consideration in an evidentiary hearing as to whether or not the fees are reasonable, are they not?

Mr. ROWE. They may well be, and again let me reiterate, Mr. O'Leary, I do not begrudge my professional brethren who specialize in contingency fee arrangements for plaintiffs—anything which they may legitimately obtain from their clients—that is not my point.

But my point is, and the courts have stressed, on numerous occasions, when you deal with large consumer class actions, you have an inherent, endemic, generic, prevalent temptation for abuse because of the inherent conflict of interest which exists when the potential legal fees of the attorney, which may be, as one court put it, astronomical, conflict with the legitimate interests of the individual claimant in the class whose interest is minimal.

Or, putting it another way, if you can file a $100 million suit on behalf of people whose interest each is $1, it makes a lot of sense to view, as the courts have feared, that the possibilities for abuse in that kind of situation are rampant, and it is the courts that have run up the red flag of caution for these arrangements.

Mr. O'LEARY. Mr. Chairman, I would request that the *City of Detroit* v. *Grinnell*,[1] the two District Court decisions[2] and the court of appeals decision in *Lindy Brothers Builders* v. *American Radiator & Standard Sanitary*,[3] be included in the record.

Senator HRUSKA. It is so ordered, without objection.

Mr. O'LEARY. Mr. Rowe, with respect to treble damage antitrust suits, would not the State attorney general be a more appropriate representative for injured consumers than private attorneys?

By that, I mean, is not the State attorney general likely to be more answerable for frivolous suits?

Does not the letter which you have cited from the State attorney general of Michigan, Attorney General Kelley, reflect an awareness on his part as to the consequences of some of these suits?

Mr. ROWE. Mr. O'Leary, I have nothing but admiration for Michigan Atty. Gen. Frank J. Kelley, by reason of anything that is contained in this letter. I have no reason, and I do not wish to impugn, in any fashion or by implication, the bona fides or sense of civic responsibility of any other State attorney general.

But my point, in that connection, would be that title IV, as now written, would permit the attorney general of the State of Upper Slabovia, let us say, to join hands with a treble damage lawyer, on a contingency fee—let us say, the same lawyers who were ousted by the court in some of these cases for bringing a frivolous and spurious claim that was unmanageable in the courts. Because an attorney could make the attorney general an offer which he could hardly refuse, whereby the attorney would offer his services free of charge, on a contingency fee basis, to bring an action on behalf of the State of Upper Slobovia, to redress and improve the general welfare of its residents by recouping "illegal profits" and "monopoly overcharges" from corporate malefactors, large or small.

I think it is that syndome of the State official joining hands with the contingency fee attorney, which, to me, is one of the real objectionable features in the proposal—which may well have been recognized by the House Judiciary Committee, in its wisdom, when they expressly imposed a prohibition on such arrangements.

Mr. O'LEARY. Is GMA prepared to support any legislation which would enable a State attorney general to aggregate small individual but widespread consumer claims?

Mr. ROWE. GMA is opposed to title IV, as it stands, in its entirety. And I could not really answer your question beyond what I have just said.

Mr. O'LEARY. Well, let me be more specific, Mr. Rowe.

Both the American Bar Association and the U.S. Chamber of Commerce testified that they would support legislation which would permit State attorneys general to sue, as representative of the class of injured consumers, subject to the provisions of rule 23, without any requirement that the State be injured in its own business or property.

Does GMA go that far?

Mr. ROWE. GMA does not go that far, because its objections, in principle, are more fundamental. As my statement reflects, GMA is opposed, in principle, to the concept of a State attorney general be-

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[1] See p. 58.
[2] For district court decisions, see p. 86 and p. 103.
[3] See p. 79.

coming an antitrust money collector; and I would think that fundamental objection in principle would put GMA in a more fundamental posture of opposition to title IV than is now currently the position of the chamber of commerce and the American Bar Association.

Mr. O'LEARY. I have no further questions, Mr. Chairman.

Mr. ROWE. Mr. O'Leary, may I just add a brief P.S. to your question about the rights of a consumer to secure redress for antitrust violations? Because I think your question really goes to the fundamentals of the objectives of this bill.

I have been, frankly, surprised in reviewing the record of these hearings—I may say, in great haste and at strange hours, in preparation for this testimony—to note that the assumption apparently is, on the part of the proponents and the staff, that there is now no legal right for a consumer to recover for antitrust violations whereby he sustains monetary injury.

And there are colloquies by Mr. Nash, who I know is a fine lawyer, and with Mr. Shapiro, who is also a very fine lawyer representing many plaintiffs in antitrust class actions, which seem to go on the assumption that the present law flatly precludes consumer recovery under section 4. But that is not a flat-footed premise that is so.

A consumer, if he is directly and immediately and monetarily injured by an antitrust violation, such as price fixing among barbers, has no legal impediment to recovery.

And, so, if the legislation is deemed to be necessary in order to give a consumer a day in court, to secure relief for direct monetary damage by antitrust violation, I would say that that is a false premise and that the legislation is not necessary for that purpose.

Frankly, I have wondered why the legislation is necessary, but in this colloquy it seems to be based on the fact that consumers cannot ever recover.

Consumers cannot recover when they are so removed and so remote, or so tenuously affected by the whole chain of events, that there is no injury, in fact, to them.

I am perplexed why it is the view of the proponents that a consumer who is only remotely or tenuously affected by some economic reverberation or ripple effect, should be the occasion for moving the majesty of the law by way of the State attorney general to file actions on behalf of the whole population of a State, imposing multimillion or billion-dollar liabilities on alleged corporate malefactors, where there is really no impediment to a legitimate recovery right now.

Mr. O'LEARY. Thank you.

Senator HRUSKA. Senator Thurmond left some questions here that he would like to have submitted to the witness for the purpose of his responding in writing to the questions.

Will you take that up with Mr. Chumbris, and arrange it?

Mr. O'LEARY. Yes.

Senator HRUSKA. The committee will stand in adjournment now, subject to the call of the Chair.

Thank you for coming, Mr. Rowe.

Mr. ROWE. Thank you very much, Senator. It was a privilege.

[Whereupon, at 4:55 p.m., the proceedings were adjourned, subject to the call of the Chair.]

THE ANTITRUST IMPROVEMENTS ACT OF 1975

TUESDAY, MARCH 2, 1976

U. S. SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10 a.m., in room 2228, Dirksen Senate Office Building, Hon. Roman L. Hruska presiding.

Present: Senators Philip A. Hart, Burdick, Hruska, Thurmond, Mathias, and William L. Scott.

Staff present: Howard E. O'Leary, chief counsel and staff director; Bernard Nash, assistant counsel; Patricia Y. Bario, professional staff member; Catherine M. McCarthy, chief clerk; Peter N. Chumbris, minority chief counsel; Emory Sneeden, assistant counsel; and Garrett Vaughn, minority economist.

Senator HRUSKA. The subcommittee will come to order.

The witnesses for today and tomorrow were asked to testify on the pending measure, which is S. 1284, referred to as the Omnibus Antitrust and Monopoly Reform Act. The witnesses were not designated by any member of this committee, the chairman, or any official member, and they will not have to appear in the record.

There is a concern that had been expressed last October, and some detail was furnished in a limited fashion on one aspect of the bill. But this, now, gives the opportunity to the representatives of the American Bar Association to testify in greater detail and in the light of a bill which is actually before the full committee.

This Senator has called attention to the fact that the seven titles of this bill compose a collection of various measures that have been considered and reconsidered and rejected by either the House or the Senate subcommittees or committees or the body of the House of Representatives or the Senate of the United States. And this is a process which, in my personal observation, has occurred over the last 20 years, and it has a history before that. Nevertheless, hope springs eternal in the breasts of some advocates of some of the measures that are included in these seven titles. So another effort is being made.

All of the topics, in my judgment, are not necessarily bad, per se, but there are many aspects and many particular provisions in them which are objectionable. They have been held to be objectionable before. And I do hope that whatever will be done that there will be due consideration given to the merit of these several objections to the several provisions, many of which will be talked about by the witnesses before us today.

A copy of the statement of each of the witnesses has been furnished to the committee.

It is my understanding, Mr. Millstein, that you will open, and then the other members of the committee will testify in their own sphere.

Mr. MILLSTEIN. Yes, sir.

Senator HRUSKA. You may proceed. Before we do that, however, could you state briefly and concisely the process by which the American Bar Association and its antitrust law section arrived at an official position which, I understand, you are presenting today?

STATEMENT OF IRA MILLSTEIN, ANTITRUST SECTION'S DELEGATE TO THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION

Mr. MILLSTEIN. I would be delighted to do that, Senator.

If I could just preliminarily make a few observations, we want to apologize for the lateness of our statement and the fact that we could not get this to you last night. We were only advised of this opportunity to appear last Thursday. It was on very short notice. We had only 4 or 5 days to get four very busy lawyers together, find a date on which we could all appear, and then prepare the statement. Accordingly, we completed it at about 1 o'colck this morning, and, again, I must apologize for the delay and the lateness in delivering it and for any typographical errors or inadvertencies that appear in there.

Nevertheless, putting polish to one side, the sense of what we want to say is contained in the statement which, I trust, is being made part of the record.

Senator HRUSKA. You may proceed on that basis.

Mr. MILLSTEIN. One other question, Senator. How much time do we have? We would like to gage ourselves accordingly.

Senator HRUSKA. As much time as you need, within reasonable bounds. We do have a session commencing at 12 o'clock. We can go a little bit past 12 o'clock. We have one other witness besides the four of you.

Mr. MILLSTEIN. Right.

Senator HRUSKA. So if we can bear that in mind, it would be very much appreciated. Nevertheless, we know the importance of the subject and your interest in it. So we want to give you as much time as you feel you need.

Mr. MILLSTEIN. Well, Senator, I will proceed right to the question which you asked.

Let me introduce myself. My name is Ira Millstein. I am the antitrust section's delegate to the house of delegates of the ABA. I am accompanied today by two members of the council of the antitrust section, which is the equivalent of its board of directors, Mr. Allen Holmes, of Cleveland, Ohio, on my left, and Mr. Earl Pollock, of Chicago, Ill., on my right. We are also accompanied by Ms. Eleanor Fox of New York City, who is the chairperson of our section 7 Clayton Act Committee. We are very happy and honored to be here to present our views on S. 1284 and very grateful that you are giving us an extended opportunity to get into this highly technical bill.

The history, Senator, of the American Bar Association's involvement in S. 1284 goes back to April 7, 1975, when the board of governors of the ABA adopted a recommendation,[1] presented by our section concerning the parens patriae legislation then pending in the House. That bore number H.R. 38, and it now bears number H.R. 8532. Both proposals follow generally the contours of title IV of S. 1284. On May 7, 1975, Mr. Walker Comegys, of Boston, Mass., presented our position on parens patriae before the Subcommittee on Antitrust and Monopoly of this committee.

We were under the impression that the version of S. 1284 being considered by the subcommittee during the spring of 1975 was undergoing substantial revision pursuant to many of the criticisms and comments which had been received by the subcommittee during the course of its hearings. We were somewhat surprised when, on July 28, the subcommittee's print came out and we found that there were certain additions to the bill which had not even been the subject of testimony. And the subcommittee then forwarded this revised bill without recommendation to this committee. Thus, we found that section 4C(c)(1) of title IV would authorize the use of sampling or statistical measures for determining damages in antitrust parens patriae suits.

After the hearings were closed and based on no testimony of which we are aware, the committee print made three dramatic additions to this already dramatic proposal for aggregating damages.

First. It permitted the statistical and sampling theories to be used not only in parens patriae cases, but in private class actions as well.

Second. It did not limit private class action damage aggregations to the Sherman Act. The provision apparently applies to actions under all of the antitrust laws.

Third. The words, "without separately proving the fact or amount of individual injury," were added, thus, apparently further changing age-old concepts of injury and damage.

We will discuss these attempts to change historic injury and damage concepts today.

The next change which was made, we believe, without any hearings, was with respect to section 704. As everyone knows, the Sherman Act has not been amended substantively since 1890. Yet the July 28 committee print, based again on no testimony of which we are aware, inserted the first substantive change in the Sherman Act in 86 years. Section 704 would have totally altered the offense of attempt or conspiracy to monopolize.

Parenthetically, we note that Senators Hart and Scott have made certain proposals to amend S. 1284 which have not yet been acted upon. We are going to comment on these amendments, as well, as we go through.

Our study—and I am leading up to how the ABA got involved in S. 1284—also indicated that title I, a very significant statement of policy, had also apparently not been fully considered in hearings before the subcommittee. And we will talk about title I today.

In addition to the foregoing, our concern about the July 28 draft was heightened by the fact that, during the course of the hearings

[1] See p. 177.

before the subcommittee, the Assistant Attorney General in charge of the Antitrust Division had indicated a number of reservations and concerns about, if not actual opposition to, certain significant portions of S. 1284. The subcommittee did not seem to respond to these. For example, the Assistant Attorney General indicated that the administration could support title III if the present $100 minimum penalty was retained. And it was not. There was no response to this. He urged the deletion in title IV of damages based on injury to the State's general economy. And, again, the subcommittee did not respond. He urged the deletion or revision in title V of a variety of provisions, about which I will not go into detail, but winding up with a suggestion that the tender offer be treated in a different manner than it had been in the bill. Again, the subcommittee responded to none of the Assistant Attorney General's suggestions with respect to title V. As to title VI, the nolo provision, he urged its deletion. But the subcommittee did not delete it. As to title VII, which is a potpourri of a number of changes, he urged the deletion of sections 702 and 703 and opposed the expansion of Robinson-Patman Act jurisdiction in section 701. The subcommittee responded to none of these suggestions.

The net of the situation was that, when our antitrust section met, we had a variety of objections to S. 1284 which had been made by such persons as the Assistant Attorney General in charge of the Antitrust Division. There had been changes made after the hearings and without any testimony. We studied them and decided to recommend to the council of our section that a total position be developed by the ABA on all of S. 1284. Accordingly, in August 1975, at a council meeting, this suggestion was proposed. The council's essential concern was that the July 28 draft was not simply a procedural reform bill which largely codified existing law and furthered the interest of fair procedures. It appeared that S. 1284 was a proposal which would significantly revamp the antitrust laws in substance and distort fair procedures by, among other things, changing the Sherman Act in substance for the first time in 86 years, very significantly adding to the powers of the Department of Justice, impeding legitimate merger and acquisition activity, and expanding and revising injury and damage concepts in revolutionary ways.

The four persons appearing before you today drafted, in August 1975, a position on S. 1284, and we presented it to the council of the antitrust law section. The antitrust law section's council modified it and adopted it. The section's recommendations were then considered and approved by the Board of Governors of the American Bar Association at its meetings on October 16 and 17, 1975. And the council's action was subsequently published in a newsletter to the over 9,000 members of the section.

I would say that the position of the ABA has received wide publicity and that the ABA position we are presenting today has moved through the normal and official channels of the ABA.

Senator HRUSKA. The committee has received—and its members have received—the resolutions which you now refer to. If they have not been incorporated into the hearing record up until now, they will be incorporated at this time and made a part of the record. And we will cite it in full text at this point in the hearing record.

Mr. MILLSTEIN. Thank you very much, Senator. I have brought extra copies with me in case the reporter would want them.

Senator HRUSKA. Of the October 16?

Mr. MILLSTEIN. Of the resolutions which were approved by the board of governors of the ABA at their October 1975 meeting.

Senator HRUSKA. And the attachment to it?

Mr. MILLSTEIN. And the attachments to it. These are all present.

Additionally, I would like to point out one other matter. After the subcommittee's hearings were closed, section 201(d) of title II was changed to authorize the Department of Justice to use the civil investigative demand, not only for its traditional antitrust investigations, but also to obtain, and I quote: "any information relevant to a Federal administrative or regulatory agency proceeding."

This seems to be a vast new expansion of Department of Justice authority to discovery in all Federal agency proceedings. This change was made apparently because the original language of S.1284 was obscure in its intention to accomplish the objective of giving such discovery to the Antitrust Division. Through inadvertence, the ABA resolution does not deal with this problem. Nevertheless, the four of us today would like to present our views on this subject.

We will hereafter divide the task of elaborating on the various titles as follows: Mr. Earl Pollock will discuss title II, the CID question; Mr. Holmes, title IV, the parens patriae problem; Ms. Fox, title V, the premerger and acquisition notification problem; and I will discuss, if time remains, titles I, III, VI, and VII. The purpose of our presentations, which elaborate on the ABA resolutions now placed in the record, is this: the committee will note that the ABA does not flatly oppose S. 1284. It recognizes Congress' concern with procedural areas which may warrant change. But the matters with which you are dealing in S. 1284 are for the most part, legally technical. Hence, the criticisms and comments which we have on S. 284 are also legally technical

S. 1284 is a closely drafted lawyer's bill. It is not a simple policy statement at all. Frequently, it is difficult to discern just what is intended. We, therefore, seek to use this opportunity to attempt to explain exactly what may appear as shorthand in the ABA report itself.

We will make certain additional comments, and obviously, we want to be available for any questions at all by this committee and its staff. Let me parenthetically state that we would be much happier were we questioned thoroughly on these subjects than if we just read prepared statements. I would be delighted if you all would interrupt at any point to ask anybody any question you have about the titles concerning which they are testifying. That is our purpose in being here today, to provide whatever expertise we can to the Senate in responding to a highly technical subject matter.

In all events, we believe, that based upon our testimony today, constructive changes can be made in S. 1284 to alter it where, in our opinion, it needs alteration and to clarify or improve certain portions where appropriate procedural changes may be desired by the Congress.

With that introduction, Senator, Mr. Earl Pollock will discuss the CID provisions, title II.

[The prepared statement of Mr. Millstein follows. Testimony resumes on p. 50.]

PREPARED STATEMENT OF IRA M. MILLSTEIN, ANTITRUST SECTION'S DELEGATE TO THE HOUSE OF DELEGATES, ABA

My name is Ira Millstein. I am the Antitrust Section's Delegate to the House of Delegates of the American Bar Association. I am accompanied today by two members of the Council of the Antitrust Section. Mr. Allen Holmes of Cleveland, Ohio, and Mr. Earl Pollock of Chicago, Illinois, and by Ms. Eleanor Fox of New York City, who is the Chairperson of the Section 7 (Clayton Act) Committee of the Antitrust Section.

We are honored to be here today to present to you the American Bar Association's position on S. 1284, and we are grateful that you have afforded us this extended opportunity to present the American Bar Association's comments and suggestions.

Permit me briefly to recount the history of the American Bar Association's actions involving S. 1284. On April 7, 1975, the Board of Governors of the American Bar Association adopted a recommendation presented by the Antitrust Section concerning the *parens patriae* legislation pending in the House, then bearing the number H.R. 38, now bearing the number H.R. 8532. Both proposals follow the general contours of Title IV of S. 1284. On May 7, 1975, Mr. Walker B. Comegys of Boston, Massachusetts, presented the American Bar Association position on *parens patriae* before the Subcommittee on Antitrust and Monopoly of this Committee.

We were under the impression that the version of S. 1284 being considered by the Subcommittee on Antitrust and Monopoly during the spring, was undergoing substantial revision pursuant to many of the comments and criticisms which had been received during the course of the Subcommittee's hearings. We were somewhat surprised when on July 28, 1975, the Subcommittee made certain significant additions to the bill that had not been a subject of testimony, and forwarded a revised bill without recomendation to this Committee. Thus:

(A) Section 4C(c)(1) of Title IV would authorize the use of sampling or statistical measures for determining damages in antitrust *parens patriae* suits. After hearings were closed and based on no testimony of which we are aware, the Committee print made three dramatic additions to this already dramatic proposal for aggregating damages. First, it permitted statistical and sampling theories to be used in private class actions as well as in *parens patriae* cases; second, it did not limit such private class action damage aggregations to the Sherman Act; the provision apparently applies to actions under all the antitrust laws; third, the words "without separately proving the fact or amount of individual injury * * *" were added, thus apparently further changing age-old concepts of injury and damages. We will today discuss these attempts to change historic injury and damage concepts.

(B) Sections 1 and 2 of the Sherman Act have not been amended in substance since 1890; yet, the July 28th Subcommittee print, based on no testimony of which we are aware, and following the close of hearings, inserted the first substantive change in Section 2 of the Sherman Act in 86 years. Section 704 of the Committee print would totally alter the offense of attempt or conspiracy to monopolize.[1] We will discuss this today.

Study also indicated that Title I, another significant proposal, had apparently not been fully considered during the hearings before the Subcommittee. We will discuss Title I today.

In addition to the foregoing, our concern about the Subcommittee's July 28th draft has been heightened by the fact that during the course of the hearings before the Subcommittee the Assistant Attorney General in charge of the Antitrust Division had indicated reservations and concerns about, if not actual opposition to, certain significant portions of various titles of S. 1284, and the Subcommittee seemed not responsive to these concerns. For example:

He indicated that the Administration could support Title III if the present $100 minimum penalty was retained[2]—and the Subcommittee did not respond;

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[1] We have been advised that Senators Hart and Scott have recently proposed certain amendments to S. 1284 which have not yet been acted upon. Among them would be a proposal to eliminate Section 704. We shall, where appropriate, comment on others of these proposed amendments.

[2] Hearings on S. 1284 at 662 (Letter from Thomas E. Kauper to Philip A. Hart, July 22, 1975).

he urged the deletion (in Title IV) of damages based on injury to the state's general economy [3]—and again the Subcommittee did not respond; he urged the deletion in Title V of provisions requiring the court to determine the purchase price of acquired stock or assets after consummation of the acquisition, as well as the "hold separate" language during the pendency of litigation, and the escrow of profits during the litigation. He also requested in Title V that the Department of Justice have concurrent jurisdiction to issue regulations along with the FTC; and he recommended that Title V deal directly with the confidentiality issue, preserving confidentiality. He suggested finally that tender offers be treated in a different manner than they had been.[4] The Subcommittee responded to none of these suggestions.

As to Title VI he urged its deletion,[5] but Title VI was not deleted by the Subcommittee. Finally as to Title VII he suggested deletion of Sections 702 and 703,[6] and opposed the expansion of Robinson-Patman Act jurisdiction [7] in Section 701. The Subcommittee responded to none of these suggestions.

In all events, the Council of our Section determined at its August 1975 meeting to develop a position on all of S. 1284. The Council's essential concern was that the July 28th Subcommittee draft was not simply a procedural reform which largely codified existing law and furthered the interests of fair procedures. It is rather a proposal which could significantly revamp antitrust substance and distort fair procedure by, among other things: changing the substance of the Sherman Act for the first time in 86 years; significantly adding to the powers of the Department of Justice; impeding legitimate merger and acquisition activity; and expanding and revising injury and damage concepts in apparently revolutionary ways.

The persons appearing before you today drafted, in August 1975, a position on S. 1284 and presented it to the Council of the Antitrust Law Section, which modified and then adopted it. The Section's recommendations were considered and approved by the Board of Governors of the American Bar Association at its meeting on October 16 and 17, 1975. The Council's action was published in a newsletter to the over 9,000 members of the Section.

I would appreciate the American Bar Association's position being made part of this record and request it be considered by this Committee in its deliberations on S. 1284. I understand that the ABA's Washington office distributed these resolutions earlier to members of this Committee.

Additionally, in Section 201(d) of Title II, after the Subcommittee's hearings were closed, the Department of Justice was authorized to use the civil investigative demand not only for its traditional antitrust investigations but also to obtain "any information, relevant to a * * * federal administrative or regulatory agency proceeding." This seems to be a vast new expansion of Department of Justice authority to discovery in all Federal agency proceedings. This change was apparently made because the original language of S. 1284 was obscure in its intendment to accomplish such an objective.[8] Through inadvertence, the ABA Resolution does not deal with this problem. We would nevertheless like today to present the views of the four of us on this subject.

We will hereafter divide the task of elaborating on the various titles as follows:

Mr. Pollock will discuss Title II; Mr. Holmes, Title IV, Ms. Fox, Title V; and I will then discuss, time remaining, Titles I, III, VI and VII.

The purpose of our presentations—which elaborate upon the American Bar Association Resolutions and Report now placed in the record—is this: The Committee will note that the ABA position is not one of flat opposition to S. 1284. It recognizes Congress' concern with procedural areas which may warrant change. But, the matters which are being dealt with in S. 1284 are for the most part legally technical, hence the criticisms and comments which we have on S. 1284 must be legally technical. S. 1284 is a closely drafted lawyer's bill—it is not simple policy at all. Frequently it has been difficult to discern just what is in-

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[3] Hearings on S. 1284 at 94.
[4] Hearings on S. 1284 at 97–99.
[5] Hearings on S. 1284 at 100–102.
[6] Hearings on S. 1284 at 102–103.
[7] Hearings on S. 1284 at 1109–1110 (Letter from Thomas E. Kauper to Philip A. Hart, July 7, 1975).
[8] See Hearings on S. 1284 at 444.

tended. We therefore seek to use this opportunity to attempt to explain what may appear as shorthand in the American Bar Association report itself, to make certain additional comments, and to make ourselves available for questioning by this Committee and its staff. We believe that based upon our testimony today, constructive changes can be made in S. 1284 to alter it where in our opinion it needs alteration, and to clarify or improve certain portions where appropriate procedural change may be desired by the Congress.

TITLE I

To us, Title I is an enigma. An enigma because it proposes numerous substantive findings about competition in what is represented as a bill to improve antitrust procedures. There is no apparent connection between most of the substantive findings proposed and the procedural provisions of S. 1284. We question why it is necessary to include highly disputed substantive findings in Title I, which findings might fundamentally alter antitrust law as we have known it since the Sherman Act was passed in 1890.[9]

The fact is that these findings are based upon no recognized consensus of opinion among economists, but rather, as the FTC has just recently stated, deal with a subject (concentration) on which there is "great uncertainty and disagreement."[10]

Section 103(2) of S. 1284 declares that the Congress finds that the decline of competition in industries in which "oligopoly . . . power" exists, "have contributed significantly to unemployment, inflation, inefficiency, underutilization of economic capacity, a reduction in exports, and an adverse effect on the balance of payments." Further in subsection (3) of section 103, increased concentration is termed an important factor "in the ineffectiveness of monetary and fiscal policies in reducing the high rates of inflation and unemployment." And again, in subsections (5) and (6) of section 103, "excessive concentration" is labelled as anti-competitive, and a finding states that a reduction in "* * * oligopoly power in the economy can contribute significantly to reducing prices, unemployment, and inflation, and to preservation of our democratic institutions and personal freedoms."

What is absent from these proposed findings is any mention of the basic goals of the antitrust laws as they were established by Congress and as they have been interpreted throughout this century. I am referring, of course, to the behavioral proscriptions of the antitrust laws. Section 1 of the Sherman Act does not prohibit concentration, it prohibits agreements in restraint of trade. Section 2 of the Sherman Act does not prohibit bigness alone, or concentration, it prohibits acts of monopolization and attempts to monopolize in restraint of trade. The Clayton Act similarly proscribes behavioral practices such as tying arrangements, exclusive dealing arrangements, interlocking directorates and agreements for the acquisition of stock or assets which may substantially lessen competition in any line of commerce.[11]

The thrust of our antitrust laws has been to proscribe certain kinds of business behavior, and to promote a certain kind of performance—competition leading to an increased quality and value of goods and services.

We are frankly concerned that the proposed findings in Title I might unwittingly turn antitrust law from a behavioral and performance orientation, to mechanical "structural" standards for judging competitiveness; that antitrust enforcers and courts might take the findings as a cue to eliminate the arduous but necessary quest for behavioral and performance evidence, and substitute instead conclusions as to the state of competition based on the number of companies in a "market." Our concern is not based on any unwillingness to await proof that such structural tests properly can be employed to preserve and protect a free market economy from anticompetitive restraints. Quite the con-

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[9] We recognize that the Hart-Scott proposed amendments in some respects alter Title I's impact and hence move in a constructive direction. They are not, however, sufficient to eliminate the objection to including in a procedural bill controverted findings on concentration.

[10] FTC, Bureau of Economics Staff Memorandum. 1974 Form LB Revision 10 (July 1975), citing *Industrial Concentration: The New Learning* (H. Goldschmid, H. M. Mann, and J. F. Weston, eds. 1974) (hereinafter cited as *Industrial Concentration*).

[11] *Cf.* recent exchange of correspondence between the Department of Justice and Congressman Wright Patman regarding the legality of a foreign joint venture acquisition of the Franklin National Bank, BNA, 751 *Antitrust & Trade Regulation Reporter*, at E–1 *et seq.* (Feb. 17, 1976).

trary, we are concerned precisely because the available evidence simply does not appear to bear out the conclusions that inefficiency, high inflation, high unemployment, excess capacity and the like are demonstrably linked with the degree of concentration.

Consider the issue of a relationship between inflation and concentration. It has been exhaustively analyzed. You will find those who will assert that concentration leads to inflation. But I believe the evidence suggests no such relationship. This was the finding of Professor Ralph Beals of Amherst in a study prepared for the Council on Wage and Price Stability last June. Professor Beals found: "For most of the past 20 years average BLS wholesale prices in the concentrated industries have risen less rapidly than prices in the unconcentrated industries." [12] The same conclusions have been reached by Professors Weston and Lustgarten and others.[13]

I believe the statement by Professor Edwards of Columbia University is apropos the entire question of the worthiness of the proposed Title I findings, and in particular the inflation-concentration issue. Parenthetically, Professor Edwards' statement is contained in a current economics best-seller—if such can be imagined—entitled "Industrial Concentration: The New Learning". It is a compendium of papers which were presented, and of discussions which were transcribed, at the Columbia Law School Conference on Industrial Concentration held in Airlie House in March 1974. It was attended by economists of all persuasions, as well as members of Congress, businessmen and lawyers. I believe it is fair to state that its primary conclusion was that the issues raised by concentration merit a great deal of continued study, but that no recognized consensus exists that concentration is responsible for all the untoward results identified in Title I.

Getting back to Professor Edwards' view on the inflation question, he stated, "The emotional aura surrounding the concentration-inflation debate is such that quick legislative action in this area is not inconceivable. This would, in my opinion, be both premature and unwise. We possess neither sound theoretical reasons nor even remotely convincing empirical evidence to justify such action." [14]

Let us also consider, for a moment, the asserted relationship between concentration and inefficiency. I believe the evidence supports no such relationship, but rather suggests that concentration evolves as a result of the development of methods of production, methods of organization, and methods of management which are more efficient, and which can be exploited as a function of larger size. Thus, Professor Harold Demsetz has shown that the findings in some studies of a weak relationship between concentration and high profits can be explained by the greater efficiencies of the relatively larger firms in the concentrated industries.[15] In other words, concentration and profits may well reflect socially desirable economies and efficiencies. In all events, as the editors of the Columbia Conference materials concluded: "The issue is far from resolved and presents continued research challenges." [16]

The FTC input on the structure-behavior debate is noteworthy at this juncture. FTC economists, such as Michael Mann, Willard Mueller, and F. M. Scherer have been among the proponents of a deconcentration policy. Yet the FTC Bureau of Economics backed away from categoricals in commenting on the issue. The Bureau has stated that the existence of positive relationships between concentration and economic performance was subject to "great uncer-

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[12] R. E. Beals, *Concentrated Industries, Administered Prices and Inflation: A Survey of Recent Empirical Research* i–11 (June 17, 1975).

[13] J. F. Weston and S. H. Lustgarten, *Concentration and Wage-Price Changes*, printed in *Industrial Concentration, supra* at 330 ("there is no relationship between concentration and either wage levels or price levels or changes in wage levels or changes in price levels over time"). *See also* S. H. Lustgarten, *Industrial Concentration and Inflation* (American Enterprise Institute 1974); Statement by Dean Lowell C. Smith in Hearings on S. 1167 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 93rd Cong., 1st Sess. (Mar. 27, 1973).

[14] F. R. Edwards, *Concentration, Monopoly and Industrial Performance, One Man's Assessment*, printed in *Industrial Concentration, supra* at 434–35.

[15] H. Demsetz, *The Market Concentration Doctrine: An Examination of Evidence and a Discussion of Policy* (AEI-Hoover Policy Studies 1973); H. Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J. L. Econ. 1 (1973); H. Demsetz, *Two Systems of Belief About Monopoly*, printed in *Industrial Concentration, supra*.

[16] *Industrial Concentration, supra* at 163. Indeed, as early as 1969, a Presidential Task Force on Productivity and Competition found that "the correlation between concentration profitability is weak, and many factors besides the number of firms in a market appear to be relevant to the competitiveness of their behavior." President's Task Force Report on Productivity and Competition, Cong. Rec. S. 6472 (June 16, 1969).

tainty and disagreement", and that "a thorough understanding of the postulated relationships, including knowledge of their possible non-existence if that is the case, is vital to the well-informed formulation and implementation of antitrust policy * * *."[17]

Perhaps it's been said best by Wesley Liebeler, former Director of Policy Planning at the FTC and currently a professor of law at UCLA. In his Office's 1976 Budget Overview for the FTC, the point was made that the weak evidence of a relationship between concentration and profits isn't the crux of the fallacy in the market concentration doctrine. What is more important is that using concentration as a standard to measure competition overlooks what is the relevant question—whether or not there is collusion:

> "As is the case in many areas of economic analysis, a simple statement of the basic theory raises questions that might otherwise have gone unasked or focuses attention on matters that might otherwise have gone unnoticed. The first point clarified by * * * articulation of the theory by which observed correlations between concentration and profits are sought to be explained, is that neither profits nor concentration are the problem. The problem is collusion.
>
> "While this might be thought to be obvious, there is a tendency for the proxy (concentration and profits in this case) which economists use to seek the underlying problem (collusion), gradually to become thought of as the problem itself."[18]

Professor Liebeler then stressed that rational antitrust policy planning should focus on collusion, not concentration.

> "For if concentration results from productive efficiency, deconcentration will cause productive inefficiency. And production inefficiency will likely cause higher prices to consumers * * *. It is hard to see why deconcentration of an industry is sensible if the result is inefficiency and higher prices to consumers."[19]

Thus, were the findings on concentration contained in proposed Title I to become implanted in antitrust law, this Congress might well be initiating a step which could throw the baby out with the bath water. According to our best economic advice, blanket condemnation of concentration will not discriminate in striking at non-collusive efficient industries along with what may be more appropriate antitrust targets.

If anything, the studies and learning seem to point to keeping the focus of antitrust law where it has been—on behavior and performance—at least until such time as some kind of economic consensus emerges which is absent now.

We submit that present antitrust law is well equipped to deal with the real problems—behavior and performance. To substitute vague proxies, such as concentration ratios (the measurement of which is subject to a debate of its own) for time-tested and common sense behavioral standards of price fixing, boycots, tie-ins, monopoly, and the like, is a monumental change in antitrust philosophy which ought to be based on a good deal more evidence than is presently available.

Finally, it would be quite dangerous to assume that the novel proposed findings in Title I, if enacted, would be ignored as so much surplusage by the antitrust enforcement agencies, by other regulatory agencies, and by the courts. The courts, for example, have long refused to allow Congress the luxury of a meaningless act. Policy declarations such as those contained in proposed Title I have been used by courts in deciding cases,[20] and no doubt also by regulatory agencies in determining upon policies which are consistent with formalized national goals and which are likely to win congressional support.

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[17] FTC, Bureau of Economics Staff Memorandum, 1974 Form LB Revision 10 (July 1975).

[18] 1976 Budget Overview, prepared by the Federal Trade Commission Office of Policy Planning and Evaluation, printed in BNA, 692 *Antitrust & Trade Regulation Reporter* at E-4 (Dec. 10, 1974).

[19] *Ibid.*

[20] For a recent example, see *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 196 (1974) ("Congress included in the Act's statement of purpose a finding that 'the existence * * * of wage differentials based on sex * * * depresses wages and living standards for employees necessary for their health and efficiency").

TITLE III [21]

Title III of S. 1284 proposes amendments to the Federal Trade Commission Act relating to the enforceability of Federal Trade Commission subpoenas and orders to file annual or special reports, and the circumstances under which a Commission respondent may challenge such process. Although it has been stated that Title III merely codifies existing case law regarding the enforceability of, and defenses to, Commission compulsory process, these porvisions would in fact alter existing law by limiting a respondent's ability to challenge in good faith the lawfulness of such subpenas and orders.

To begin with, proposed Section 301(a) would amend Section 10 of the Federal Trade Commission Act by increasing the civil penalties for failure to file an annual or special report or to obey a Commission subpoena from the present $100 per day commencing thirty days after notice of default to a $1,000 to $5,000 mandatory daily penalty commencing fifteen days after such notice. While an increase in the daily forfeiture penalty may be appropriate to adjust for the impact of inflation, the combined effect of simultaneously increasing the daily penalty and cuting in half the time period before such penalties start accruing makes it highly likely that a Commission respondent will not obtain a court hearing before substantial, even crippling, daily penalties have already accrued which cannot thereafter be reduced or eliminated by the court.

If penalties are to be increased, therefore, it is essential that the court be allowed discretion to reduce the daily penalty below the $1,000 minimum to avoid serious potential injustice. A court should not be required to impose significant monetary penalties before it can consider whether penalties should be stayed while agency process is challenged.

But the revisions in Title III go even further. Title III would create a rigid three part test forbidding a stay of such penalties unless the respondent could demonstrate (i) a substantial probability of success on the merits; (ii) irreparable harm unless the penalties are stayed; and (iii) equities clearly favoring a stay. This multi-faceted standard—which would be more difficult to meet than even the "reasonable probability of eventual success" standard which must be shown by a party seeking a preliminary injunction—is a severe deviation from the existing case law standard for staying such penalties. As established by the Supreme Court, civil penalties for failing to comply with FTC compulsory process may be stayed if the judicial challenge is being made in "good faith." [22]

This present judicial standard is based upon due process principles and cannot be lightly disregarded. As the Supreme Court stated in one of a long line of cases that commenced in 1908:

> "[T]he right to a judicial review must be substantial, adequate, and safely available; but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." [23]

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[21] We recognize that Senator Magnuson has recently requested that this Committee conform the provisions of Title III to S. 642. Should this be done, our comments herein would remain applicable, since it would not appear that there are substantive differences between the two.

[22] *St. Regis Paper Co.* v. *United States*, 368 U.S. 201, 226–27 (1961); *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331, 338 (1920). *See also Genuine Parts Co.* v. *FTC*, 445 F.2d 1382, 1394 (5th Cir. 1971).

There seems to be confusion surrounding the intent of Title III which we submit has been created by the Federal Trade Commission and the Administration. The Commission in its testimony on Title III stated that the stay standard was designed to adopt the general preliminary injunction standard of the *Petroleum Jobbers* case (that is, probability of success and irreparable harm), thus limiting the "good faith" stay standard. Subsequently, however, the Administration submitted a letter to Senator Hart (p. 662 of Hearings), to make clear that regardless of the actual language of Title III, its *intent* was not to adopt a new FTC subpoena standard, but rather to "merely codify decisional law." The FTC then made a further submission (p. 664 of Hearings) in an effort to resolve this inconsistency, stating, somewhat curiously, that the Title III standard would *not* limit the "good faith" standard because: "A good faith defense should have a substantial probability of ultimate success on the merits."

[23] *Wadley Southern Railway Co.* v. *Georgia*, 234 U.S. 651, 661 (1915). *Accord, St. Regis Paper Co.* v. *United States, supra; Natural Gas Pipeline Co.* v. *Slattery*, 302 U.S. 300, 310 (1937); *Oklahoma Operating Co.* v. *Love, supra; St. Louis, Iron Mt. & So. Ry. Co.* v. *Williams*, 251 U.S. 63 (1919); *Ex parte Young*, 209 U.S. 123 (1908).

In our opinion the applicable authorities hold that penalty statutes, such as that proposed in Title III, can pass constitutional muster only if the person subject to the cumulative penalty can in good faith seek a prompt judicial determination of the validity of the agency action, during which time the accrual of penalties is stayed.

Thus, because Title III would mandate the accumulation of non-discretionary, severe monetary penalties during the pendency of a good faith judicial challenge to FTC process, and would also impose upon those seeking to stay such penalties an unduly strict burden of proof, we believe this portion of S. 1284 is of doubtful constitutionality.

Consider this example. A Commission subpoena or special order is directed at a small company or an individual who is not even the target of the Commission investigation, and such respondent believes in good faith that the process imposes an undue burden or asks for documents irrelevant to the investigation. Immediately upon service of a notice of default, this respondent seeks a judicial test of the legality of the Commission process, and a stay of the daily accumulation of penalties so it can challenge the process without debilitating penalties overhanging the court test. In view of increasingly heavy court calendars, assume that a court does not even hear and decide the merits of the stay application until 40 days after the fifteen day period has run—a rather optimistic estimate today—this small company or individual will be automatically liable for *at least* $40,000 as the cost of entrance to the courthouse—even if the respondent ultimately succeeds on the merits of the lawsuit. Moreover, in view of the unduly strict burden of proof Title III would create, it is likely that the respondent could challenge the legality of the agency process only at the peril of staggering penalties accumulating daily during the course of the court test.

We believe Title III deviates from existing case law in still another important respect, which is not explicitly covered in the ABA Resolutions and Report. We believe it fair to deal with it today because it is another instance where Title III does not codify existing law. The courts have increasingly acknowledged the right of a party adversely affected by an administrative order to seek a judicial test of the validity of that order prior to institution of an enforcement proceeding by the agency. In fact, less than thirty days ago the Court of Appeals for the Third Circuit in *A. O. Smith Corporation* v. *FTC* decided that a respondent to a Federal Trade Commission special report order had a right to commence a suit challenging the legality of the order prior to the Commission's service of a notice of default and prior to the commencement of an enforcement action by the Commission. In doing so, the Third Circuit confirmed the principles of pre-enforcement review enunciated by the Supreme Court ten years ago in the *Abbott Laboratories* trilogy,[24] to the effect that a court should have discretion to accept or reject a pre-enforcement suit depending upon the kind of inquiry involved, the numerosity of parties and other considerations which may indicate that such a suit is the most efficient way of resolving the entire controversy. Rather than codifying case law, therefore, Title III would overrule the Third Circuit's decision by prohibiting such a suit until after the service of a notice of default, and would retard the development in the courts of this area of administrative law, without publicly examining the many policy and legal considerations which the courts have been attempting to take into account.

Finally, Title III—perhaps inadvertently—limits the circumstances under which a Commission subpoena or order could be enjoined on the merits to only two of the three due process grounds enunciated by the Supreme Court. The bill would authorize an injuction if it is shown that compliance would be "unduly burdensome" or that the information sought "is not reasonably relevant to the inquiry being conducted." The bill fails to authorize an injunction on a showing that the inquiry is not within the authority of the agency. Because we believe there are unequivocal Supreme Court rulings that Commission compulsory process is unconstitutional under such circumstances,[25] revision is essential to correct this deficiency.

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[24] *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967); *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967).

[25] *See, e.g., United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209 (1946).

TITLES VI AND VII

Title VII contains various miscellaneous provisions. Some of these revisions would be duplicative of existing law, as the Department of Justice has pointed out. Other parts of Title VII we believe would create problems with the efficient enforcement of the antitrust laws.

But surely the most drastic substantive revision of the antitrust laws would have been Section 704, which would have eliminated, in cases involving attempts to monopolize, the requirements of a showing of a dangerous probability of achieving a monopoly, and proof of a relevant product and geographic market. We understand that Senators Hart and Scott have suggested elimination of Section 704 from the bill. We enthusiastically endorse that suggestion.

We also enthusiastically support Senators Hart and Scott in suggesting the elimination from S. 1284 of that part of Title VI which would make a plea of *nolo contendere* in an antitrust criminal proceeding admissible as *prima facie* evidence in subsequent private treble damage cases.

Section 701 of Title VII would extend the jurisdictional reach of the Robinson-Patman Act and Section 3 of the Clayton Act to activities which affect interstate commerce without actually being in the flow of such commerce. In addition, this provision would expand the applicability of Section 7 of the Clayton Act to corporations whose activities only affect interstate commerce. We believe that these changes, which would overrule two recent Supreme Court decisions,[26] are both unnecessary and inappropriate. The Robinson-Patman Act has been the subject of, extensive criticism, and sweeping changes to limit the scope of or even to repeal, this statute, are being proposed. Indeed, one of the leading opponents of the Robinson-Patman Act is the Department of Justice, which has expressed its opposition to any expansion of its jurisdictional scope.[27] At this time, therefore, it would seem particularly inappropriate to expand the jurisdictional reach of the Robinson-Patman Act until Congress has undertaken a thorough re-evaluation of its substantive provisions.

Furthermore, there is simply no need for expanding the jurisdictional scope of Sections 3 and 7 of the Clayton Act at a time when vigorous antitrust enforcement programs are being undertaken in a large number of the states—with the active encouragement of the federal enforcement agencies—to deal with local restraints on a local level. Moreover, there has been no indication from the case law that the commerce limitations have created any enforcement problems. The effect of Section 701 would be to transfer to the federal courts—already heavily overburdened—a large number of local disputes that more appropriately belong in the state courts.

Section 702 of Title VII would authorize a federal district court to provide expedited handling in *any* antitrust case—government or private—if it designates the case as "complex." Thus, any private plaintiff seeking recovery for a private wrong might have his case expedited even though no significant economic or social questions may be involved, and no other reason exists for providing priority in our crowded courts. As long as the plaintiff can demonstrate that its case is "complex" (which is undefined), vindication of its private interest in seeking treble damages may be expedited at the expense of important public and private interests in other areas of the law.

Section 702 would also authorize district courts to appoint "special masters, economic experts, and other personnel" to assist the court in the trial of a complex antitrust case. But we believe district courts already have the authority to appoint masters and experts,[28] and for this reason the Department of Justice has recognized that Section 702 is unnecessary.[29] Moreover, provisions in Section 702 authorizing trial use of such personnel as both witnesses and assistant judges raises disturbing ethical and legal, let alone constitutional, questions.

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[26] *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974) (Robinson-Patman Act); *United States* v. *American Maintenance Industries*, 45 L. Ed. 2d 177 (1975) (Section 7, Clayton Act).

[27] Hearings on S. 1284 at 1109–10 (Letter from Thomas E. Kauper to Philip A. Hart, July 7, 1975).

[28] *See, e.g.*, Rule 53, F.R.C.P.; *Manual for Complex Litigation* § 3.21.

[29] Hearings on S. 1284 at 102.

Section 703, which would authorize dismissal of cases where foreign law prohibits discovery, suffers from the same infirmities as Section 702. Federal Courts already possess ample authority under Rule 37 of the Federal Rules of Civil Procedure to deal with a failure to produce evidence, and the Department of Justice opposes Section 703 on this ground.[30] But most importantly, Section 703 could have substantial adverse international implications, and may even be unconstitutional if it conflicts with the foreign policy of the United States or violates international law.

Finally, we believe that Section 705, which would *require* an award of attorneys' fees in pirvate injunction cases where the plaintiff "substantially prevails," should be revised to permit such an award in the discretion of the court. Because of the wide variety of factual situations which may be presented, we believe that a mandatory requirement would be inappropriate.

Senator HRUSKA. We have been joined by several members of the Judiciary Committee: Senator Thurmond of South Carolina, Senator Burdick from North Dakota, and the Senator from Maryland, Mr. Mathias.

STATEMENT OF EARL POLLOCK, MEMBER OF COUNCIL OF ANTITRUST SECTION OF THE AMERICAN BAR ASSOCIATION

Mr. POLLOCK. Thank you, Mr. Chairman.

I would like to restate our appreciation of the opportunity to appear here and present the views of the American Bar Association and the witnesses today on this important proposal.

As Ira has indicated, I have been assigned, in particular, the subject of title II. Title II, as the committee knows, would significantly amend legislation enacted in 1962 known as the Antitrust Civil Process Act. The proposed amendments of that act would vest in the Department of Justice far-ranging investigatory powers comparable to those of a grand jury, and, indeed, many powers which not even a grand jury possesses.

Under the present statute, so-called CID's, civil investigative demands, are limited to the production of documents. They are limited to companies which are under civil investigation by the Department of Justice.

The present statute excludes service of the CID's on natural persons, In addition, the act protects the confidentiality of the documents which are produced under CID's by forbidding transmission outside the Department of Justice. And the act also limits use of the documents to actions which result from that particular investigation.

Title II would make enormous changes of great significance in the present statute. It would greatly expand the Department's authority to demand information and would eliminate many of the most importand safeguards which were carefully incorporated in the 1962 statute.

In particular, to be more specific, the bill would permit the Department of Justice to use CID's to obtain precomplaint discovery: (1) against natural persons, as well as legal entities, such as corporations or partnerships; (2) through oral testimony, interrogation by personnel of the Department, plus written interrogatories, as well as the production of documents, the only means of this now permitted precomplaint discovery under the 1962 act; (3) and this is extremely

[30] *Id.* at 102–03.

important, it would permit such discovery from third parties, no matter how innocent they may be of any alleged violations, as well as from the targets of the investigation, to which the act is now confined; (4) with respect to contemplated mergers and joint ventures, as well as past and present conduct; and (5) for use in connection with regulatory and administrative proceedings, as well as in civil antitrust investigations. In addition, the bill removes many of the principal safeguards placed in the 1962 act to protect the confidentiality of the information.

Now, our essential position can be stated very simply: and that is that Congress should restrict the Department's CID power to obtain discovery from the targets of a civil antitrust investigation. Consistent with that principle, the American Bar Association does support amendment of the Antitrust Civil Process Act to authorize CID's First, with respect to planned mergers and joint ventures; second, against natural persons who are targets of the investigation; and third, to obtain written interrogatory answers from investigation targets.

As Ira indicated, we are not here in blind opposition to the proposals contained in this bill. On the other hand, consistent with the basic principle which we have enunciated, we do oppose expansion of the CID power: First, to use against third parties who are not targets of the investigation; and second, use of CID's to obtain discovery for use in administrative proceedings of other agencies. In the event that the CID power is, nevertheless, extended to third parties, there must, we strongly believe, be procedural safeguards placed in the bill to at least reduce the likelihood of prosecutor excess and citizen abuse.

Such protections ought to include in each CID identification of the target of the investigation and a full description of the nature of the investigation, including indentification of the applicable provisions of law and the nature of the conduct constituting the alleged antitrust violation which is the subject of the investigation.

Furthermore, counsel for the target in such circumstances, in accordance with, we believe, traditional concepts of due process, should have full rights of participation and access when the CID is used against other parties. Furthermore, confidentiality of the information must be assured.

Finally, in the event that use of the CID is authorized with respect to regulatory and administrative proceedings, it must, in our view, be confined to the Antitrust Division's traditional mission of promoting competition as it may relate to those proceedings. The proper definition of this relationship is nowhere to be found in the hearings on the bill or in its provisions. And we believe that such profound problems of definition ought to be answered before a proposal such as this becomes law.

Perhaps the most dramatic way of illustrating the extraordinary scope of title II is by referring to the provisions of title II dealing with the taking of oral testimony by Government prosecutors.

Under this bill, whenever the Antitrust Division, "has reason to believe" that any person, and that includes private individuals, no

matter how innocent of any wrongdoing that person may be, may have any information relevant to a civil antitrust investigation or Federal administrative or regulatory agency proceedings, that person may be required, under the threat of severe criminal penalties, to appear before prosecutors of the Antitrust Division for interrogation.

The examination would be under oath. There would be no hearing officer present to prevent improper interrogation or to protect the rights of the witness. The witness may have counsel present, but, under the bill, counsel would be forbidden to have any part in the proceeding except to state briefly on the record objections to particular questions on the grounds of privilege or other lawful grounds.

All other persons, under the bill, except for the witness, except for his lawyer, except for Department personnel and the court reporter, would be barred from the hearing. In the case of an antitrust investigation, the witness would be advised of the nature of the investigation. In the case of an inquiry relating to regulatory and administrative proceedings, the witness would not have to be advised of anything. In either event, the Department would not be obliged to advise the witness whether he is a potential defendant in any action, civil or criminal.

If the witness elects to invoke the privilege against self-incrimination, the bill provides that the privilege may be overridden by a grant of use immunity. The witness would have only a very qualified right to a copy of the transcript of his own testimony, and he would have no right whatsoever to copies of the transcripts of testimony of other people. Furthermore, where the testimony is taken from a third party witness——

Senator THURMOND. Mr. Chairman, may I interrupt just a moment?

Senator HRUSKA. Senator Thurmond is recognized.

Senator THURMOND. I have got to go to the White House, and I have some questions here.

Mr. POLLOCK. By all means, Senator.

Senator THURMOND. Could I compile them and leave them for the record?

Senator HRUSKA. Very well.

Senator THURMOND. I will leave them with you.

Senator HRUSKA. Very well. The questions will be received and the witnesses to whom they are directed will respond in writing. We will see that they are incorporated in the record.

Thank you, Senator Thurmond.

You may proceed.

Mr. POLLOCK. I was describing, Mr. Chairman, the terms of the present bill with respect to the taking of oral testimony. I would also point out that, where the testimony is taken from a third party witness, the targets of the investigation would receive no notice of the hearing, would have no opportunity to participate or even be present, and have no right to obtain a copy of the transcript after the hearing.

The American Bar Association believes that some of the changes proposed in title II are in the public interest. And I have referred briefly to those. More specifically, we support amendment of the act to authorize the Department to utilize CID's with respect to planned

mergers and joint ventures. We also do not object to extension of the CID power to authorize written interrogatories to targets of the investigation. And, in addition, where individuals are targets of the investigation, there would appear to be no substantial reason for barring use of the CID to obtain documents or interrogatory answers from such persons, subject, of course, to the privilege against self-incrimination. However, the other major changes which are proposed in title II, raise, we believe, questions of the utmost gravity concerning traditional requirements of fair procedure, the proper role of law enforcement officers, and the possible abuse of governmental power.

As the committee is aware, these considerations were strongly emphasized in the deliberations which resulted in the 1962 act. There, for example, a number of the Senators and Representatives expressed their concern, in particular, about provisions which would have authorized a subpena power enabling prosecuting officers to obtain sworn oral testimony by placing businessmen under oath in the absence of a hearing officer and like safeguards. The same point had been made in the report of the Attorney General's report to study the antitrust laws in 1955.

Certainly, there is nothing in our Nation's experience since the 1962 act which serves to reduce in any way the danger of improper use of investigative power or the need for adequate safeguards and proper limitations on the CID power. In our view, Congress was correct to restrict the Department's CID power to obtaining nontestimonial discovery from the targets of a civil antitrust investigation, and we believe that it should adhere to that restriction in amending the act.

The possible ramifications of abandoning that restriction are, we think, enormous. Many antitrust investigations and regulatory proceedings involve entire industries. In such instances, the Antitrust Division would probably have, in the proposed language, "reason to believe" that there may be literally thousands of persons—competitors, suppliers, and customers, in addition to the targets of the investigation—who might have information of the possible relevance to either a civil antitrust investigation or an administrative or regulatory proceeding.

Under this bill, every such person, in the discretion of the Division, would be subject to CID requiring him to appear before Division prosecutors for interrogation, to answer written interrogatories, to produce documents, or to furnish any combination thereof. Government prosecutors, we believe, should not have such sweeping powers as a matter of principle, and furthermore, we are unaware of any showing by the Department that it needs such sweeping powers for effective enforcement of the antitrust laws.

For the reasons stated, we are highly doubtful of the wisdom of expanding the CID powers to include any testimonial interrogation. However, if Congress, despite its prior rejection of such proposals, were determined to provide such new and sweeping authority, we would urge that it be limited to the targets of the investigation.

In addition, the bill should confirm the right of any witness examined under this procedure to make all objections permissible under the Federal Rules, to refuse to answer or terminate the examination when it would be appropriate under the Federal Rules, to review and

to certify the transcript of his testimony and, of course, to receive a copy of that transcript.

Furthermore, if testimonial interrogation is permitted and is not limited to the targets of the investigation, then Congress, we would urge, must provide further safeguards to protect the rights of those being investigated.

As is the case with any governmental institution charged with prosecutorial responsibilities, we think the Department of Justice will prove a more worthy repository for congressional and public trust if its discretion to investigate in this area is properly limited by traditional requirements of both due process and confidentiality.

Now, these, we believe would be the key safeguards in that connection. First, the bill ought to provide expressly, as the present law now provides, that the new procedures require a preliminary identification of the targets of the investigation. At the time of the initiation of the investigation, the Department should provide proper written notice to the targets, including a description of the nature of the investigation, the applicable provision of law, and the particular matters which are the subject of the investigation. This kind of identification and notice are a necessary foundation for the targets' collection of information responsive to the investigation and for the preparation of an appropriate defense.

The written notice should also define the parameters of the investigation. Unlike the present bill, the Federal Rules of Civil Procedure are framed so as to limit the scope of proper discovery to the subject matter of the pleadings in order to avoid unnecessary expense and improper intrusions into privacy. Under title II, however, there is no comparable reference point, with the result that Government investigators may well be tempted to venture far afield in their investigative demands.

Senator HRUSKA. Can you describe a target for us?

Mr. POLLOCK. A target of the investigation would be a person suspected of a violation of the antitrust laws and, at the present time, the Antitrust Civil Process Act limits the use of the CID to such persons.

Senator HRUSKA. That makes it clear in the record.

Mr. POLLOCK. We would urge that that be maintained.

Senator HRUSKA. But that is not natural persons under the present law, is it?

Mr. POLLOCK. That is right.

Senator HRUSKA. This bill extended to individuals.

Mr. POLLOCK. It extends to individuals and, indeed, extends far beyond that to natural persons and other entities which are not targets of the investigation, but may simply, in the view of the Division, have some information which may be relevant either to a civil antitrust investigation or some regulatory or administrative proceeding being conducted by some other agency of the Federal Government.

Senator HRUSKA. Thank you. It will be helpful to follow the rest of your testimony now that the record defines what a target is.

Mr. POLLOCK. Yes; a second important safeguard is that counsel for a target should have proper notice of the taking of any oral testimony, whether of another target—that is, another person suspected of antitrust violations—or a third party, and should have the right to attend,

the right to cross-examine witnesses at that hearing, and the right to lodge appropriate objections. We think this is important since such testimony may well be used by the Government at trial in a subsequent action or in some ancillary proceeding involving the targets' interests.

For the same reason, counsel should have access, subject, of course, to appropriate protective orders, to all materials that are collected under these procedures, such as the deposition transcripts, documents, and interrogatory answers.

Senator HRUSKA. Now, Mr. Pollock, before you leave that part, may I ask if the target is a corporation of national scope? Let us say it starts in Seattle, and just for the purpose of being a little more definite, the target will be a corporation in Seattle, it will be a lumber company, it will have vast holdings, it will have stumpage, it will have transportation problems, it will have marketing and distribution and so on. Now, does this second point, to which you refer, require that any individual employed by the corporation, wherever that individual is—suppose it is down in Louisiana where there would be stumpage of the lumber company—would the lumber company in Seattle have to be notified that that employee down in Louisiana is about to be interrogated, and that the necessary elements of the notice be set out, and time of the hearing and so on be indicated? Is it that sort of thing?

Mr. POLLOCK. Yes, we would urge that, Senator. We think it is entirely appropriate that the alleged target of the investigation be apprised of hearings which are to be held concerning the very matters which are the subject of the investigation against that company. Nor would it necessarily be limited to employees of such a company, since under this bill, if that aspect of the bill were approved, potentially hundreds and even thousands of people who are not associated with that company could be subject to CID requiring them to produce information with respect to that target.

Senator HRUSKA. So that it could be distributors, it could be dealers, it could be customers, it could be transporters, none of whom would be officially connected or employed or contracting with the target corporation?

Mr. POLLOCK. That is right, and, of course, under the bill, it need not be a target corporation. It could be a target individual.

Senator HRUSKA. And it could be a target industry with several corporations, could it not?

Mr. POLLOCK. Yes, it could, Senator.

Senator HRUSKA. And the world at large, almost, would be at the command of the investigator armed with the provisions contained in this title. Is that a fair statement?

Mr. POLLOCK. That is correct. Many antitrust investigations, as I have suggested, may involve industries that may affect hundreds of companies, and in such circumstances, it is entirely possible that almost anyone involved in the industry might conceivably have some information which may be relevant to the subject of the investigation.

Under the terms of this bill, any such person would be subject to a CID. And the point that we are making here is that, in the event that that kind of sweeping extension of the CID power were approved so that the CID power could be used against these individuals and companies who are not themselves targets in the investigation, we

think that it is in accord with basic concepts of due process to apprise the target of these hearings which are being conducted, and to give counsel for the accused an opportunity to be present at, and participate, in at least a limited way, in such a proceeding.

Senator HRUSKA. Under the bill, who can be present at the oral interrogation of a witness?

Mr. POLLOCK. Under the bill, Senator, it is provided that the only persons who may be present are the Division personnel conducting the interrogation, the person who has sworn the witness, presumably a notary public, the witness, his counsel, whose rights are severely circumscribed by the bill, and the court reporter. The bill provides that all others shall be excluded.

Senator HRUSKA. That is a procedure which exists in grand jury proceedings, is it not?

Mr. POLLOCK. Yes. However, there are two extremely important differences: First, as the Senator and the committee are well aware, the basic concept of the grand jury is that it serves as a buffer, as it were, between the Government prosecutors and those who are being interrogated; second, there is readily available the district court, which has convened the grand jury, for the protection of the interests and the rights of those witnesses who are called before the grand jury. This bill would provide for no such protections, and instead, would place each witness, in large measure, subject to the discretion of the Division prosecutors.

Senator HRUSKA. Under the bill, the interrogating counsel for the Department of Justice, if the witness asserted his privilege of against self-incrimination, could that Government attorney grant immunity on the spot?

Mr. POLLOCK. It is provided, Senator, that use immunity could be granted only through the kind of application to the district court which is necessary in a grand jury proceeding. On the other hand, there is not provided a comparable recourse to the district court on the part of the witness with respect to the protection of his rights and providing relief to him.

Senator HRUSKA. Very well, thank you. You may proceed.

Senator BURDICK. Mr. Chairman?

Senator HRUSKA. Senator Burdick.

Senator BURDICK. Your second point here is very similar to the notice given in depositions; is it not? You require that when there is a third party being examined that the target should have notice.

Mr. POLLOCK. That is correct.

Senator BURDICK. In that regard, it is very similar to depositions.

Mr. POLLOCK. Yes, that is correct, and we think that if this kind of procedure is to be adopted, we can learn much from the procedures which are provided in the Federal Rules of Civil Procedure, so that we do not have essentially secret hearings outside the presence of the very party which has the most at stake in the matter.

Finally, by way of a further safeguard which we believe to be extremely important, the confidentiality of all materials produced pursuant to procedures under title II should be preserved to the very maximum extent. Toward that end, we think that such materials should be exempted from the disclosure provisions of the Freedom of Information Act.

Furthermore, we oppose the——

Senator HRUSKA. Just a minute. Mr. Nash, assistant counsel, has a question at this point to follow the question of Senator Burdick.

Mr. NASH. This relates to your point with respect to following the Federal Rules of Civil Procedure concerning depositions which allow the targets of an investigation to be present during the taking of testimony of a third party witness; say, a competitor with evidence relevant to the investigation.

Assistant Attorney General Thomas Kauper has taken the position strongly opposing permitting third party parties to be present during interrogation of the third party witnesses. He states in a letter to Chairman Rodino, of the House Judiciary Committee, dated November 18, 1975, as follows:

> Second and more fundamentally, the presence of counsel for the target at precomplaint deposition hearings would turn the investigatory process into an adversary hearing without precedent in American jurisprudence. If there is an appropriate analogy, it would be to the grant jury investigation where it is clearly and firmly established that counsel for the person under suspicion has no right to be present during the examination of his client, let alone third parties. One of the most compelling justifications for this secrecy is the concern that, absent assurances of confidentiality, witnesses may be reluctant to testify fully and completely; this concern applies equally well to the civil antitrust investigation because suppliers and customers may otherwise be subjected to retaliation by the target for their cooperation with authorities. The ability of putative defendants to intimidate prospective witnesses or to formulate a common defense strategy tailored to evidence obtained by the Government also weighs heavily against turning the investigation into an adversary proceeding.
>
> Secrecy in this setting is acceptable because of the right of a defendant, in subsequent civil or criminal proceedings, to cross-examine, fully, all witnesses and to object to the introduction of evidence on appropriate grounds of law or privilege. It must be remembered that the inquiry by the Department at this stage is simply to determine whether suit should be brought. In the event a complaint is filed, then, and only then, will the matter proceed through the litigation process, during which time the target will have the opportunity of every defendant to be present and to participate at all appropriate stages.

And Assistant Attorney General Kauper then followed up quoting from the 1960 decision written by Chief Justice Earl Warren, in *Hannah* v. *Larche*: "The FTC could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial." And concluded that "this applies equally well to antitrust investigations conducted by the Department of Justice."

Now, would you care to comment for the record on concerns voiced by the Assistant Attorney General that this type of an amendment would frustrate the ability of a department to expeditiously commence and conclude its investigations?

Mr. POLLOCK. Well, at the outset, I am not aware of any showing by Assistant Attorney General Kauper or the Division that, without this extraordinary provision, it has in any way been impaired in effective antitrust enforcement. Furthermore, we do not propose that this kind of interrogation be turned into an adversary proceeding. We do not think it makes it an adversary proceeding merely to give the accused an opportunity to be present when the compulsion of law is being utilized by the prosecutor to obtain testimony of this kind.

Beyond this, we think that the suggestion that the targets' rights may be fully protected merely when a lawsuit may, ultimately, result does not reflect the reality of an antitrust case. The only effective way

that rights of an accused in such a case can be protected is by the initiation at the earliest stage of efforts to make an inquiry as to what the person is being charged with, to collect evidence that is pertinent to that, and attempt to defend the accused from those charges. If one must wait until the Government finally, in its discretion, chooses to file a complaint, it may well be too late to properly protect the rights of the accused.

I have no doubt that it may well be that the Antitrust Division would prefer—as this letter indicates—not to have counsel for the target be present. I can understand why the prosecutor may well wish to have this done in secrecy, but balanced against those desires of the prosecutors must be, we think, certain elementary concepts of due process certain elementary need to protect the interests of those who are entitled to the presumption of innocence.

Mr. NASH. Chief Justice Earl Warren rejected that very argument about whether the Constitution and elementary consideration of due process should afford targets of a Government investigation the right to be present and to oversee the Government investigation until such time as the Government files a case.

The *Hannah* v. *Larche* case is quite a survey of all Government investigations. I will ask the chairman to make the case part of the record.[1]

Mr. POLLOCK May I just say, Mr. Nash, that having served as the law clerk for Chief Justice Warren during the first 2 years in which he served as Chief Justice, I would find myself strained to disagree with the Chief Justice, but I think, if I recall the case you are referring to, you are speaking of a case involving the Civil Rights Commission. You are not speaking of a case involving the right of a prosecutor, having the power to initiate criminal action, to call to his office third party witnesses as well as targets for testimonial interrogation. We would submit that what might be appropriate in the case of an agency such as the Civil Rights Commission would by no means be appropriate in a situation such as we have here. Nor are we suggesting that any and all information which the Department of Justice would develop with respect to an investigation must be shared with the target of the investigation.

We are talking instead about rights of the accused in the extraordinary situation where the prosecutor conducts interrogation under compulsion of law of third party witnesses—which we think would represent quite a different situation.

I know Mr. Millstein wished to make a comment on this as well.

Mr. NASH. The balance of the question is whether you could state for the record any Federal or State regulatory agency or prosecutorial body which permits targets of an investigation to be present, have access or conduct cross-examination during the investigative phase before it is concluded with the filing of a complaint.

Mr. POLLOCK. Well, I think the question instead is: What other process is there in Federal law for granting to a Federal prosecutor the right to compel testimony in this way? I know of none.

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[1] See p. 284.

Senator HRUSKA. Let the record at this point show that our chairman of the Antitrust Monopoly Subcommittee has arrived a few minutes ago. If he has any questions at this point——

Senator HART. Indeed, no; nor shall I later. I knew that the distinguished panel would be here and I wanted to leave another meeting to welcome them and to assure them, as I know our minds are said to be solidly formed on this issue.

Mr. POLLOCK. Thank you, Senator.

Senator HRUSKA. Mr. Millstein, you have a comment to make in this regard, I believe.

Mr. MILLSTEIN. I think in the interest of moving it along, because it is 11 o'clock, we can respond in writing or after the meeting to Mr. Nash, if that's agreeable, Senator Hruska? I would like to respond later in writing, if we can.

Senator HRUSKA. That's fine.

Mr. POLLOCK. In one remaining moment, I would like to comment briefly on provisions of title II which would authorize the Department to utilize CID powers not only in connection with a civil antitrust investigation, which is the present scope of the Antitrust Civil Process Act, but also any "Federal administrative or regulatory agency proceeding." We oppose this extension of the Department's authority. We believe that the CID power should be confined to use against targets of civil antitrust investigations and should not be permitted against third parties who have any information of that sort. Even more clearly, we do not believe that this extension to regulatory and administrative agencies should be permitted.

The Department, in those circumstances where it has a desire to participate in some way in the regulatory or the administrative proceedings of another agency, should, like all others participating in the proceeding, use the discovery techniques available under the procedures of that agency. We see no justification for superimposing on those agency procedures an extraordinary set of special investigative powers which the Department of Justice alone would possess to the exclusion of all other participants in that administrative proceeding.

In fact, adoption of this aspect of title II would really mean authorization to conduct ancillary proceedings of the Department's very own every time it shows its discretion to participate in the proceedings of other agencies.

Finally, the implications of such authority, we would point out, are extraordinarily far reaching. Expansion of the Department's CID powers would make changes of great significance in the relationship with the Department and other agencies. We are not commenting here on whether that relationship should be changed or not changed. We believe strongly, however, that such changes in that relationship with other agencies, that those changes are much too important to make by indirection without directly facing the difficult issues which they present.

Thank you very much.

[The prepared statement of Mr. Pollock follows. Testimony resumes on p. 63.]

Prepared Statements of Earl E. Pollock

TITLE II

Title II would significantly amend the Antitrust Civil Process Act of 1962, 15 U.S.C. §§ 1311–1314. The amendments would vest in the Department of Justice far-ranging investigatory powers comparable to those of a grand jury as well as many powers which not even a grand jury possesses.

Under the present statute, the Department of Justice may serve a pre-complaint civil investigative demand for documents upon any corporation or other business entity for the purpose of determining whether the recipient is or was engaged in illegal activities under the antitrust laws. The present law limits "CID's" to companies under investigation, excludes natural persons, protects the confidentiality of the documents by forbidding transmission outside the Department, and limits use of the documents to actions resulting from the investigation.

Title II would enormously expand the Department's authority to demand information and would eliminate many of the most important safeguards incorporated in the present statute. In particular, the bill would permit the Department to use CID's to obtain pre-complaint discovery (1) against natural persons as well as legal entities, (2) by oral testimony and written interrogatories as well as the production of documents, (3) from third party witnesses as well as from the targets of the investigation, (4) regarding planned mergers and joint ventures as well as past and present conduct, and (5) for use in the proceedings of regulatory agencies as well as in antitrust investigations. The bill also removes the principal safeguards to protect confidentiality of the information.

Our essential position is: *Congress should restrict the Department's CID power to obtaining discovery from the targets of a civil antitrust investigation.*

Consistently with that principle, the American Bar Association supports amendment of the Antitrust Civil Process Act to authorize CID's (1) with respect to planned mergers and joint ventures, (2) against natural persons who are targets of the investigation, and (3) to obtain written interrogatory answers from investigation targets.

On the other hand, consistently with the principle, we oppose expansion of the CID power (1) against third parties and (2) to obtain discovery for use in administrative proceedings of other agencies.

In the event that the CID power is extended to third parties, there must be procedural safeguards suggested below to reduce the likelihood of prosecutor excess and citizen abuse. Such protections should include in each CID identification of the target of the investigation and a full description of the nature of the investigation, including applicable provisions of law and the nature of the conduct constituting the alleged antitrust violation which is under investigation. Further, counsel for the target should have full rights of participation and access when the CID is used against third parties. Importantly, confidentiality must be assured.

Finally, should use of the CID be extended to regulatory and administrative proceedings, it must be confined to the Antitrust Division's traditional mission of promoting competition as it may relate to those proceedings. The proper definition of this relationship is nowhere found in the hearings on the bill. Such profound problems of definition should be answered before proposals such as this becomes law.

The extraordinary scope of Title II is perhaps most dramatically illustrated by its provisions for the taking of oral testimony by government prosecutors. Under the bill, whenever the Antitrust Division "has reason to believe that any person [no matter how innocent of any wrong doing he may be] . . . may have any information, relevant to a civil antitrust investigation or Federal administrative or regulatory agency proceeding," that person may be required, under threat of severe criminal penalties, to appear before Division attorneys for interrogation. The examination would be under oath. There would be no hearing officer present to prevent improper interrogation. The witness may have counsel present but counsel would be forbidden to have any part in the proceeding except to state briefly on the record objections to particular questions "on the grounds of privilege or other lawful grounds." All other persons (except for Department personnel and the court reporter) would be excluded.

In the case of an antitrust investigation, the witness would be advised of the nature of the investigation. In the case of an inquiry relating to regulatory and administrative agency proceedings, the witness need be advised of nothing. In either event, the Department would not be obliged to advise the witness whether he is a potential defendant in any action, civil or criminal. If the witness elects to invoke the privilege against self-incrimination, the privilege may be over-ridden by a grant of use immunity. The witness would have only a qualified—and very limited—right to a copy of the transcript of his own testimony (and no right to copies of transcripts of testimony of others).

Furthermore, where the testimony is taken from a third party witness, the targets of the investigation would receive no notice of the hearing, would have no opportunity to participate or even be present, and have no right to obtain a copy of the transcript after the hearing.

The American Bar Association believes that some of the changes proposed in Title II are in the public interest. More specifically, we support amendment of the Antitrust Civil Process Act to authorize the Department to utilize CID's with respect to planned mergers and joint ventures; confined to targets of the Department's investigation, such additional authority would seem to be in accord with the basic objectives of the 1962 Act. We also do not object to extension of the CID power to authorize written interrogatories to targets of the investigation. In addition, where individuals are the targets of the investigation, there would appear to be no substantial reason for barring use of the CID to obtain documents or interrogatory answers from such persons (subject, of course, to the privilege against self-incrimination).

However, the other major changes proposed in Title II raise questions of the utmost gravity concerning traditional requirements of fair procedure, the proper role of law enforcement officers, and the possible abuse of governmental power. These considerations were strongly emphasized in the deliberations which ultimately resulted in the 1962 Antitrust Civil Process Act. Thus, the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws—while endorsing the basic concept of the CID—also stated (pp. 345–46):

> "We reject the proposal for legislation authorizing the Department of Justice to issue the type of administrative subpoena typically employed by regulatory agencies. Unlike the Federal Trade Commission, for example, the Department of Justice is entrusted only with law enforcement. The grant of subpoena powers suggests broader regulatory powers, structural reorganization, a system of hearing officers and a panoply of administrative procedural protections which the Committee is not prepared to recommend. *We would, in addition, disapprove any subpoena power that would permit prosecuting officers in antitrust investigations to summon sworn oral testimony by placing businessmen under oath in the absence of a hearing officer and like safeguards. Such authority is alien to our legal traditions, readily susceptible to grave abuse and, moreover, seems unnecessary.*" (Emphasis added; footnotes omitted.)

Similar reservations about lodging inquisitorial powers in prosecutors were repeatedly expressed in the Congressional hearings and debates preceding adoption of the Antitrust Civil Process Act. (The American Bar Association, among others, objected to proposals to compel testimony and other pre-complaint discovery from third-party witnesses.) After reviewing the legislative history, one court noted "the tremendous concern shared by the committees, and others concerned with the bill, that it be surrounded by adequate safeguards and proper limitations on its scope" and pointed out that "A real fear was expressed as to the danger of improper use of investigative power." *United States* v. *Union Oil Co. of California*, 343 F.2d 29, 35 (9th Cir. 1965) (footnotes omitted).

Certainly, there is nothing in our Nation's experience since the 1962 Act which serves to reduce "the danger of improper use of investigative power" or the need for "adequate safeguards and proper limitations." *In our view, Congress was correct to restrict the Department's CID power to obtaining non-testimonial discovery from the targets of a civil antitrust investigation, and should adhere to that restriction in amending the Act.*

The possible ramifications of abandoning that restriction are enormous. Many antitrust investigations and regulatory proceedings involve entire industries; in such instances, the Antitrust Division would probably have "reason to believe" that there may be literally thousands of persons—competitors, suppliers, custom-

ers in addition to the targets of the investigation—who "may have any information, relevant to a civil antitrust investigation or Federal administrative or regulatory agency proceeding." Under the bill, every such person—in the Division's discretion—would be subject to CID's requiring him to appear before Division prosecutors for interrogation, to answer written interrogatories, to produce documents, "or to furnish any combination thereof." Government prosecutors, we believe, should not have such sweeping powers as a matter of principle; and furthermore we are unaware of any showing by the Division that it needs such sweeping powers for effective enforcement of the antitrust laws.

For the reasons stated, we are highly doubtful of the wisdom of extending the CID power to include any testimonial interrogation. If Congress, despite its prior rejection of such proposals, were determined to provide such new authority, we would urge that it be limited to the targets of the investigation. In addition, the bill should confirm the right of any witness examined under this procedure to make all objections permissible under the Federal Rules; to refuse to answer or terminate the examination when appropriate under those Rules; to review, correct, and certify the transcript of his testimony; and to receive a copy of the transcript.

If testimonial interrogation is permitted and is not limited to the targets of the investigation, then Congress, we believe, must provide further safeguards to protect the rights of those being investigated. As is the case with any governmental institution charged with prosecutorial responsibility, the Department of Justice will surely prove a more worthy repository for Congressional and public trust if its discretion to investigate in the antitrust field is properly limited by traditional requirements of due process and confidentality.

First, the bill ought to provide expressly, as the present law now requires, that the new procedures require a preliminary identification of the targets of the investigation. At the time of the initiation of the investigation, the Department should provide proper written notice to the targets of the investigation, including a description of the nature of the investigation, the applicable provision of law, and the particular matters which are subject to investigation. Such identification and notice are a necessary foundation for the targets' collection of information responsive to the investigation and for the preparation of an appropriate defense. The written notice should also define the parameters of the investigation. Unlike the present bill, the Federal Rules of Civil Procedure are specifically framed to limit the scope of proper discovery to the subject matter of the pleadings in order to avoid unnecessary expense and improver intrusions into privacy; under Title II, which specifies no similar reference point, government investigators may be tempted to venture far afield in their investigative demands.

Second, counsel for a target of the investigation should have proper notice of the taking of any oral testimony, whether of another target or a third party, and should have the right to attend, to cross-examine witnesses, and to lodge appropriate objections to any testimony offered, since such testimony may well be used by the government at trial in a subsequent action or in some ancillary proceedings involving the target's interests. For the same reason, counsel should have access, subject to appropriate protective orders to ensure confidentiality, to all materials collected under these procedures, including deposition transcripts, documents and interrogatory answers.

Finally, the confidentiality of all materials produced pursuant to procedures under Title II should be preserved to the maximum extent. Toward that end, such materials should be exempted from the disclosure provisions of the Freedom of Information Act.[1] Further, we oppose the provisions in Title II [§ 201 (e)] which would permit the Antitrust Division to use CID-obtained information in any other cases or proceedings (including proceedings of other agences) in which the Division is involved and to turn over such information to the Federal Trade Commission for use in any matter under its jurisdiction. Adoption of these provisions would, for all practical purposes, make the confidentiality of the

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[1] Assistant Attorney General for Antitrust Kauper testified on May 7, 1975 as follows in support of the preservation of confidentiality:

> "We would favor clear and complete exemption from FOIA for any information, in whatever form, obtained through a CID. By definition, such information is investigatory and frequently consists of confidential business data. While it would thus probably be exempt from disclosure in any event, we strongly favor specific statutory language to that effect."

information subject entirely to the discretion of Division and Commission personnel and would thereby destroy one of the key safeguards built into the 1962 Act.

There remains for consideration the provisions in Title II which would authorize the Department to utilize its present and proposed investigative powers not only inconnection with "a civil antitrust investigation" (the present scope of the Antitrust Civil Process Act) but also any "Federal administrative or regulatory agency proceeding". We oppose this extension of the Department's authority. As stated above, we believe that the CID power should be confined to use against targets of civil antitrust investigations, and should not be permitted against third parties who may merely have "any information, relevant to a civil antitrust investigation". Even more clearly, we beleve that CID powers should not be allowed where there is no civil antitrust investigation and where the Department is merely seeking information to use for some undefined purpose in an administrative or regulatory proceeding being conducted by another federal agency.

In those circumstances, the Department should—like all others participating in the proceeding—use the discovery techniques available under the procedures of the other agency. If those procedures should be deficient, consideration should be given to statutory or administrative modification of those procedures. But we see no justification for superimposing on such agency procedures an extraordinary set of special investigative powers which one participant—the Department of Justice—would possess to the exclusion of all other participants in the proceeding. Indeed, adoption of this aspect of Title II would mean, in effect, authorization to the Department to conduct ancillary proceedings of its own every time it chose in its discretion to participate in the proceedings of another agency.

The implications of such authority are, to say the least, Far-reaching. Extension of the Department's CID powers to proceedings of other agencies—although styled only a procedural revision—would make changes of great significance in the relationship of the Department and other agencies. Whether such changes are good or bad is beyond the scope of this statement. We believe, however, that such changes are too important to make by indirection without facing the difficult issues which they present.

Senator HRUSKA. Senator Burdick, have you further questions of this witness?

Senator BURDICK. Well, I have some questions I would like to ask the panel when they get through; not this particular witness. I would like to ask Mr. Pollock. though, if he would supply for the record the distinction between the cases referred to here and the opinion of Chief Justice Warren E. Burger in the present situation, if he would make that for the record? Could you do that? You are distinguishing a civil rights case.

Mr. POLLOCK. I think that we would like to submit a letter to develop that point more fully.[1]

Senator BURDICK. Then I will withhold the rest of my questions until the time they are finished.

Senator HRUSKA. Very well. Mr. Millstein?

Mr. MILLSTEIN. Before moving on to Mr. Holmes, I would like to underscore this last point that Mr. Pollock made on the question of regulatory reform. The extension of the Department's powers to discovery in the Federal regulatory agency proceedings is really a step in the process of what we think of as regulatory reform. This provision is a major step which should not be taken lightly. As we read the bill, we don't quite understand what the powers or the authority of the Department would be in moving into regulatory agency proceedings.

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[1] See pp. 396 and 398.

Accordingly, we are suggesting to the Senate that it not take this step when everybody does not understand exactly what is happening. If the Department of Justice is to be permitted to become an active participant in regulatory proceedings with some sort of CID power, then it seems to us the Senate ought to spell out what the relationship between the Department and the regulatory agency is and what the function of the Department in a regulatory agency proceeding might be.

The Antitrust Law Section is beginning to explore this question by asking committees to study the types of legislation which are being introduced in the Senate on regulatory reform. I believe Senator Percy has introduced one bill; Senator Kennedy has one; there are apparently others pending in the Senate now. We really ought to have an opportunity to pass on those, study and comment intelligently on them before a step like this is taken; namely, this great expansion of the Department's right to discovery in agency proceedings.

Senator, we are now going to move on to the question of parens patriae suits under title IV.

Senator HRUSKA. Before we do that, Senator Hart, have you any questions?

Senator HART. No.

Mr. MILLSTEIN. Mr. Holmes, of Cleveland, Ohio, will deal with title IV, the parens patriae legislation.

Mr. HOLMES. Thank you, Senator.

Senator HRUSKA. I am sorry for the defect in some of the amplifying equipment. You may proceed, Mr. Holmes.

STATEMENT BY ALLEN C. HOLMES, MEMBER OF THE COUNCIL OF THE ANTITRUST SECTION, AMERICAN BAR ASSOCIATION

Mr. HOLMES. Thank you, Senator. May I first join my colleagues in thanking you and this committee for the opportunity to be here today.

As Mr. Millstein has stated, the American Bar Association has previously testified before the Antitrust and Monopoly Subcommittee with respect to title IV of this bill, parens patriae. On May 7, of 1975, Mr. Walker B. Comegys testified for the American Bar Association, expressing the views that had been set forth in a resolution adopted by the ABA a few months earlier in connection with the similar parens patriae legislation pending in the House.

Senator HRUSKA. Would the witness suspend to allow the chairman to say for the record that Senator Scott of Virginia has just joined the hearing panel.

Mr. HOLMES. Since the time of that testimony, title IV has been the subject of substantial revision prior to being reported out by the Antitrust and Monopoly Subcommittee.

We are pleased to note that the subcommittee did make certain amendments which the ABA, among other witnesses, had suggested and, in particular, the deletion of the State attorney general authority to institute damage suits on behalf of corporations and other businesses residing in the State. Further, it deleted the language which would have required the Attorney General of the United States to institute

a suit on behalf of the citizens of a State when a State attorney general had not done so.

We also understand that amendments have been recommended by Senators Hart and Scott which would delete the provision which would authorize State attorneys general to bring suit to recover for damages to the general economy of a State, whether measured by any decrease in revenues or increase in expenditures or otherwise. This proposed amendment is of particular importance, for as Mr. Comegys testified, such damages would invariably lead to duplicative recoveries despite efforts to avoid such duplication. Any recovery for damage to the general economy of a State would, moreover, result in a dollar figure that would be totally speculative and unrelated to any actual harm that might have been caused by an antitrust violation. It appears to us essential that this concept be deleted from the bill.

We do note that certain of the changes which Mr. Comegys suggested last May have not been adopted in the bill that was reported by this subcommittee, and we urge that our previous recommendations be reconsidered by the committee.

Finally, and of greatest importance, the bill that was reported by this committee would apply in a most significant respect to private class actions instituted under the antitrust laws. And, in so doing, would introduce concepts of very questionable constitutionality, which are totally foreign to private suits and to the purpose of parens patriae legislation itself.

As Mr. Comegys stated in his testimony, the ABA agrees wholeheartedly with the concept of seeking a means to redress any widespread consumer harm in connection with small individual claims arising from antitrust violations. We believe that it is essential that those who engage in antitrust violations which have the most direct consumer impact should not be permitted to retain the profits of their wrongful acts. On the other hand, a defendant has the right to a fair hearing with all constitutional safeguards. Accordingly, so long as those rights are protected, Congress and the courts should provide whatever remedies are available which, in fact, permit the recovery of damages to consumers injured by antitrust violations.

We say again what we said last May: Antitrust suits instituted by a State attorney general for damage on behalf of the consumer citizens of the State could, in fact, be such a remedy. We urge that a very simple and straightforward bill providing for representative actions by the State attorney general under rule 23 of the Federal Rules of Civil Procedure would fully accomplish such goals while protecting the rights of defendants.

As originally drafted, title IV authorized the court, in its discretion, to determine when the interests of justice require that a suit instituted by a State attorney general on behalf of citizens of the State should only proceed as an action subject to the requirements of Federal Rule 23. We endorsed that attorney general class suit concept as to consumers, but we urged that the other forms of attorney general suits contemplated by the bill be rejected because they deprived defendants and class members of basic constitutional rights, including the right to a fair hearing, adequate notice, and substantive due process of law.

Unfortunately, the bill reported by the subcommittee last July, deleted the rule 23 alternative entirely. In its place, the bill retained the concept of suits for damages to the general economy, which we understand is now proposed to be deleted, and the concept of State attorney general civil actions to recover damages for natural persons residing in the State. Such suits would not be subject to the protection afforded by Rule 23.

We respectfully submit that this committee should consider in depth whether it would be more appropriate simply to amend the law so as to provide that a State attorney general is an adequate representative, within the meaning of rule 23, of consumer interests within the State, whether or not the State itself has been injured in its proprietary capacity. Thus, such suits would be subject to the safeguards contained in Federal Rule 23, which benefit both plaintiffs and defendants alike.

As to the computation of damages, we noted in prior testimony that even in horizontal price-fixing conspiracies it cannot be assumed that competitors so engaged will sell at uniform prices or will retain identical prices throughout the period of the conspiracy. Such situations will not permit damage computations in gross, such as authorized by title IV, but will rather require individual damage computations. We further noted that those few situations which do permit of uniform methods of damage computations, for example, when competitors agree to raise their prices in identical amounts and retain that price increase during the entire period covered by the claim for damages, do not require, to be manageable, the provision for aggregation of damages in gross as proposed in title IV. Such suits are, in fact, readily manageable under rule 23 as it presently stands. Individual damage hearings in such situations can be conducted expeditiously by a master who needs merely to multiply the overcharge by the number of units purchased. Whether rule 23 procedures are utilized or new procedures are devised under the proposed legislation, there must be some hearing procedure by which individual injured consumers establish their right to participate in the recovery.

Unfortunately, the bill reported by this subcommittee not only failed to delete the provisions for the aggregation of damages in gross contained in the original draft, but extended this concept to all private class actions instituted on behalf of natural persons under section 4 of the Clayton Act.

It thus removed, by one stroke, one of the most basic substantive requirements of private antitrust actions under section 4 of the act. That act has always required that the particular private plaintiff demonstrate that he has in fact been injured in his business or property by reason of anything forbidden in the antitrust laws. In other words, this addition, which is, of course, irrelevant to the subject matter of the bill because it deals with private suits rather than suits instituted by a State on behalf of its citizens, would radically alter the existing law by eliminating the requirement that a plaintiff prove, as an integral part of the antitrust violation, that he is in fact suffering cognizable injury as a proximate result of that violation.

As this committee knows, Federal court jurisdiction is limited under article III of the Constitution, to a case or controversy involving

parties who must show injury in order to have standing to bring a suit, and is subject to the requirements of procedural due process. Any provision that authorizes a court to assess damages against a defendant without hearing in regard to proof of any actual injury to identified plaintiffs must invariably run afoul of these two principles.

We note, moreover, that although the bill limits State attorney general suits to violation of the Sherman Act and that an amendment has been proposed which will apparently further limit the violations to section 1 of the Sherman Act, present section 4(c) of title IV will authorize damages in gross in any private class action antitrust suit, including violations of the Robinson-Patman Act and other provisions of the Clayton Act. This sweeping substantive revision of antitrust damage law has no place in this title which ostensibly deals only with the concept of parens patriae.

As we stated in earlier testimony, we do recognize the legitimate interest of this committee in seeing to it that antitrust wrongdoers are deprived of profits obtained as a result of their illegal acts. Nonetheless, extreme care is essential to avoid undue penalty under the antitrust laws that already provide, as a deterrent to violations, for treble damages and for substantial criminal penalties, which have recently been vastly increased. Accordingly, if this committee determines to retain a concept of damages in gross, without proof of the fact of injury, we strongly urge the following limitations:

(1) Such relief should be carefully limited to class actions instituted by the State attorney general;

(2) Recoveries in gross should be authorized only in attorney general suits involving hardcore antitrust violations such as price fixing. Limiting such suits to section 1 of the Sherman Act does not go far enough;

(3) Relief in gross should not be permitted when it will be duplicative of damages recovered by either those who have excluded their claims from the suit pursuant to their right to opt out or a business entity which has instituted suit that is intended to cause the defendants to disgorge any retained benefits of such violations. Such limitations would avoid duplicative recoveries, would permit those damaged parties other than consumers represented by the attorney general to recover their damages, and would nevertheless insure that any improperly obtained gains are in fact disgorged by the antitrust violator;

(4) It should be provided that damages awarded in gross should not be trebled, for although trebled damages may have a legitimate place in individual damage suits, to encourage private plaintiffs to bring suit and to deter those who would violate the antitrust laws, treble damages are not needed to encourage class actions instituted by the State attorney general; and

(5) Finally, notice by publication should not be authorized when the defendant voluntarily offers to provide individual notice to all natural persons on whose behalf the suit is brought and who can be identified through reasonable effort. Such a provision would go further toward preserving the rights of those supposed to be represented by the State, but who might not receive notice pursuant to the publication standards presently contained in the bill.

In our previous testimony, we also objected to that provision of title IV which provides for distribution of sums obtained from defendants other than to those demonstrably injured by defendants.

No court has ever held on the merits that any such treatment of antitrust recoveries, the so-called fluid recovery or pot of gold, is permissible. Although defendants have, on occassion, agreed to such dispositions in settlement situations, it has been rejected, in every instance, when opposed by a defendant.

The concept of fluid recovery suffers from the same potential constitutional infirmaties as found in connection with the concept of aggregation of private damages in gross. I should also note that one commentator has pointed out a serious economic consequence which would be involved when a residual fund is used to lower prices below a true cost. This commentator observed that such a result would be court-ordered predatory pricing action which would have significant adverse effect on competition.[1]

Furthermore, seeking indirect benefit for the citizens of the State by making the defendants use residual funds to achieve social goals by, for example, making drug companies found to have engaged in price fixing build drug clinics, is no real solution, since the same companies are totally free to retrieve their losses through increased prices that create a direct detriment to those who might or might not be benefited by the indirect social benefit mandated by the court.

Quite simply, if, in fact, private suits now provided for by section 4 of the Clayton Act and the State attorney general class action suits which we suggest and recommend should be legislated, do not sufficiently insure that a wrongdoer is deprived of his ill-gotten gains, this objective should be accomplished by the direct means of increased corporate and individual fines pursuant to the recently enacted Antitrust and Penalties Act, and maximum jail sentences for violators, as permitted by that act. If experience shows that these new penalties are insufficient, Congress has the authority to create more severe punitive measures. Title IV of S. 1284 cannot be expected to do that job.

Among several other problems of title IV, we do want to note our concern in connection with the definition of the term "State attorney general." As written, the term would include any person authorized by State law to bring action under the bill. This definition would include private attorneys retained by the State to sue on its behalf. The House counterpart legislation has had a provision added to this definition, to the effect that this term does not include any person employed or retained on a contingency fee basis. We would recommend that the addition of this language to section 4(F)(1) be considered. Such arrangement would significantly reduce the amount of the damage fund available to injured consumers if entered into.

We understand that Senators Hart and Scott intend to introduce an amendment which would authorize the court to determine the amount of plaintiffs' attorneys' fees, if any, which should be awarded in suits instituted under the new legislation. That is a meritorious

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[1] Managing the Large Class Action, *Eisen* v. *Carlisle & Jacquelin*, 87 Harv. L. Rev. 426, 447 (1973).

provision which we endorse. However, in order to make it clear that the State may not enter into a separate contingency fee arrangement with outside counsel, we urge the addition of the language contained in the House bill concerning the exclusion of attorneys employed on a contingency fee basis from the definition of State attorney general.

Finally, and I think important, we have noted the exchange of correspondence between Senator Hruska and Chief Justice Burger, which indicates that the impact of S. 1284 on the balance between the workload of the courts and their resources to deal adequately with their caseloads, as well as the bill's impact on practice under rule 23 of the Federal Rules of Civil Procedure, will be presented to the Judicial Conference of the United States at its meeting commencing on April 7 of this year. It appears to us that such consideration by the Judicial Conference is peculiarly appropriate, in view of the sweeping expansion of Federal jurisdiction proposed by this legislation.

Thank you very much.

Senator HRUSKA. Mr. Holmes, would labor unions be subject to the lawsuits under S. 1284, in view of such cases as the *United Mine Workers* and the *Pennington* case and the *Jewel Tea Co.* case? If you are not prepared to answer that, you may furnish a reply for the record, but some off-the-cuff comment on it at this time would be welcomed.

Mr. HOLMES. Yes. We shall be delighted to furnish a written response; but I can say that I am satisfied that they would be included in the class of persons who would be subject to suit were they to be found to be violators of the antitrust law?

Senator HRUSKA. Well, they were found to have violated, and then proceeded against antitrust laws in the *Jewel* case and in the *Pennington* case, were they not?

Mr. HOLMES. Yes, they were, Senator.

Senator HRUSKA. Now, with that as a premise, the act would apply and the remedy would be available under S. 1284, against labor unions, in those circumstances; is that correct?

Mr. HOLMES. In those circumstances where individual citizens of a State would have a claim against those wrongdoers, yes, Senator.

Senator HRUSKA. Unless there is objection, there will be incorporated in the record, at this point, a paper commenting on a paper of the Bureau of National Affairs, Inc., which was published in 1967, shortly after the decisions of the Supreme Court in the *United Mine Workers* v. *Pennington* case and *Amalgamated Meat Cutters* v. *Jewel Tea Co.* case.

Mr. HOLMES. Very well.

Senator HRUSKA. It comments upon this very subject, and will serve as a basis and foundation for any comment you might want to add to this.

Mr. HOLMES. Thank you, Senator.

Senator HRUSKA. Senator Hart, have you any questions?

Senator HART. No.

Senator HRUSKA. Senator Burdick?

Senator BURDICK. Not at this time.

Senator HRUSKA. The next witness will be Ms. FOX.

STATEMENT OF ELEANOR M. FOX, SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION

Ms. FOX. Thank you very much, Mr. Chairman.

I am very pleased to be able to be here today, and am honored to be invited.

I will speak about title V, which is the title that provides for premerger notification and related provisions. Title V is intended to aid antitrust enforcement against illegal mergers. It would not change rules of legality, but it would change the procedures. The essential changes it would make fall into four categories:

The first is premerger notification:

The second is a 30-day waiting and discovery period, which could be extended by 20 days or more;

The third is automatic temporary restraining orders, with a shift of the burdens from plaintiff to defendant on the ensuing motion for a preliminary injunction;

And the fourth applies where a preliminary injunction is not entered. That would provide for a nearly automatic hold-separate order and a mandate to deprive the losing defendant of the benefits of the acquisition.

The first two categories are aimed at giving the Government sufficient knowledge and sufficient time to sue and to seek preliminary relief if that is appropriate. We believe these are proper objectives. We think a premerger notification program and a waiting period for certain merging companies could be salutary and would be an aid to antitrust enforcement.

However, the last two categories are, in our view, unnecessary and overly restrictive. Their predominant effect will be to deter or abort lawful business transactions. If a merger is probably unlawful, the courts will grant a preliminary injunction against it today; if it is probably lawful, it seems wrong that the courts should stand in the way at the outset of a litigation, or impose penalties on the loser at the conclusion. I should like to deal in greater detail with each of these four categories.

First, as to premerger notification, as I have indicated, we support, in concept, notification of mergers. We support notification of mergers over a minimum value. Of course, the Federal Trade Commission already has a notification program.

The premerger notice provisions of title V do not add a good deal to the existing FTC requirements, but they do include more mergers jurisdictionally, they do insure notice reasonably prior to consummation of the transaction, and they do make the filings directly available to the Assistant Attorney General in charge of Antitrust. We believe that such additions are saluatory.

However, we believe the notice revision suffers from overbreadth. It requires the reporting of a $10 million acquisition by a $100 million company. Such an acquisition is probably not likely to offend the antitrust laws.

Inclusion of all such transactions is likely to deluge the antitrust authorities with meaningless paper and immerse them in unnecessary administrative duties. The Federal Trade Commission has used a more realistic reporting minimum of $250 million in sales or assets, and apparently, according to the testimony of former FTC Chairman Engman, the FTC has found this minimum entirely satisfactory. Chairman Engman said, in testimony:

> If we have to conduct full investigations of all mergers exceeding the $100 million assets or sales test, the fruits of our efforts might not be worth the cost.

Second, as to the waiting period, a short waiting period sufficient to give the Government time to analyze transactions would be an aid to responsible antitrust enforcement. Thirty days would seem to us to be a reasonable period. The bill as reported allowed an additional extension of 45 days after receipt of information and documents requested by the Government.

We are pleased to note that this period may be reduced to 20 days by the proposed amendment; but even the 20-day period presents problems that we think should be cured. The most obvious problems inhere in the tender offer situation. The offering company must, under the Williams Act, accept tendered stock within 60 days of tender, or risk its withdrawal. To cure the time problem caused by this possibly extended waiting period, we propose the following: In order to take advantage of the discretionary time extension, the Government should be required to make its request for information and documents within 10 days after notification is filed.

Third, temporary restraining orders and preliminary injunctions: Subparagraph (d) of the bill, as reported, would grant the Government preliminary injunctions at its will. We strongly opposed this provision, as did many others, including FTC Chairman Engman. Presumably, within the notice period, the Government would have assembled sufficient facts to prove that it was entitled to preliminary relief, if it was so entitled. If preliminary injunctions were made automatic on mere application of the Government, without any adversarial testing on the merits, large numbers of probably lawful transactions would be unduly restrained.

Senator Scott and Hart have proposed an amendment that would go only a small way toward curing this problem. In essence, the Government would have the right to an automatic temporary restraining order, and on the ensuing motion for preliminary relief, the usual burdens would be shifted.

The preliminary injunction would issue unless defendants show that the Government does not have a reasonable probability of success on the merits, or that defendants will be irreparably injured by loss other than loss of benefits of the transaction. The burden on defendants would be a hard one indeed, and one would expect the preliminary injunction to issue even where the Government's case is thin. As experience teaches, the grant of preliminary relief often aborts the deal; therefore, we can expect many lawful transactions to be frustrated by the provisions. The present law that the Government must show a reasonable probabiilty of success seems a far fairer allocation of burdens.

The automatic temporary restraining order is itself a problem. The problem is magnified in tender offer cases where entry of the order will almost surely kill the tender offer. Therefore, the case is particularly strong for eliminating tender offers under the Williams Act, from subparagraph (d). Indeed, we think that subparagraph (d) should be eliminated entirely, except for its very salutary expediting procedures, for the existing law governing temporary restraining orders and preliminary injunctions is fair and effective.

Fourth, and finally, hold-separate orders, escrowed profits, and disgorgement of benefits: Subparagraph (g) mandates a hold-separate order unless justice requires otherwise, authorizes profits to be escrowed, and mandates disgorgement of the benefits of the transaction.[1] This provision is, of course, intended to cover those cases in which no preliminary injunction issues under subparagraph (d). It is hard to understand how such restrictions are merited in a case in which the Government—to borrow words from subparagraph (d)—"does not have a reasonable probability of ultimately prevailing on the merits." [2]

In any event, a hold-separate order, although it might be appropriate, should be won by the plaintiff in an adversarial proceeding, or negotiated, if granted at all.

Subparagraph (g) provides, also, that the court may order that profits of the acquired firm, or stock or assets, be placed in escrow, and that the court shall deprive the losing defendant of all benefits of the violation. These provisions are apparently intended as a deterrent to illegal acquisitions, and as a method of preventing acquiring companies from profiting from their illegal acts.

These objections are salutary, but the solutions are not. The bill would tend to discourage the acquiring company from maximizing the competitive potential as well as the efficiency of the acquired firm. The defendant will lose its incentive to do so. It is likely to prefer to spend its money and efforts where its investment is a surer one, and the acquired firm is likely to stagnate.

We believe that subparagraph (g) provides disincentives to competition; [3] and we oppose it.

In conclusion and summary, we favor premerger notification and a reasonable waiting and discovery period, during which the Government may gather information sufficient to make enlightened decisions whether to sue and whether to seek preliminary relief. Having this information, the Government will be well situated to get preliminary relief where it is reasonably likely to prevail. When the Government's case is so thin that it is not likely to prevail, we believe the merging companies should have the right to consummate the transactions and

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[1] We do not read subparagraph (g) as changing the law regarding divestiture, and to the extent that it reaffirms the rule that divestiture is in most cases the preferred remedy for a section 7 violation, we have no objection to it.

[2] Under subparagraph (d), a preliminary injunction may be denied if it would irreparably injure defendants, but presumably in such case the court would order a hold-separate order under (d) if appropriate, so that subparagraph (g) is not needed for this circumstance.

[3] Subparagraph (g) would deter mergers that are probably lawful, since these are the mergers that do not invite preliminary relief under subparagraph (d). There is no public interest in deterring lawful mergers.

we believe they should fully retain their incentives to operate efficiently and to compete effectively.

Senator HRUSKA. Senator Burdick, have you any questions?

Senator BURDICK. Yes; I would like to ask a question.

Ms. FOX. Yes.

Senator BURDICK. In your hypothetical case, you seemed to endorse prenotification of certain cases, but any time that a company of $10 million and a company of $100 million began to merge in some way, if you were the Attorney General you would look at it very carefully, wouldn't you?

Ms. FOX. I don't think I would seek out mergers of such size. I would look for all mergers that might offend the antitrust laws. The problem with the dollar standard is, dollars do not directly correlate with the legality of the transaction. The benefit of having a dollar minimum in notification programs is to weed out mergers that are so small that they are probably not going to be among those that are illegal. This does not mean that there cannot be a small merger that is not legal. But the FTC covers a number of such situations by its own rules, with respect to industries like the cement industry and food distribution, where it fears that there might be undue concentration or lack of competition; and it provides for notification in such cases.

Senator BURDICK. What I am trying to get at is what is the prenotification of two companies merging, any physical size, and the Attorney General, doing a duty, makes inquiries?

My question is, is 30 days, 45 days, 60 days long enough to do the job, or is the Attorney General apt to ask for a restraining order or temporary injunction—whatever you call it—just to be on the safe side?

Ms. FOX. Yes; he may ask for an injunction to be on the safe side.

Senator BURDICK. Now, there are situations, when I was in North Dakota, where the merger was brought about by dire necessity; they were out of capital, and had to wait 60 days and then get a temporary injunction and have that enforced until the merits are heard—and if you are sick, your patient may die.

Ms. FOX. You point out a very significant problem with the bill. Under the bill, even as to the amendments proposed, there would be a temporary restraining order that is automatic, and could not be lifted under any circumstances.

Senator BURDICK. Well, my question is, is it better for this sick company to take a chance on merging now, as long as they are going to get some infusion, money or blood, and just meet this question later? Now, here is a case that I know where prenotification has probably killed the company.

Ms. FOX. Yes. I believe that there should be exceptions where necessary.

The FTC, as you probably know, did have premerger notification rules. It changed them to rules that require notification 10 days after agreement in principle to merge, but not necessarily premerger notification. That has its benefits, because it does not stop deals that might be aborted if premerger notification is required.

Senator BURDICK. Well, something has got to be done where time is of the essence; you cannot wait for months and years to go by.

Ms. FOX. I think that is absolutely right; and even if restrictions are imposed along certain lines, as I have indicated here, I think it is essential that a temporary restraining order must be able to be lifted. If the TRO is provided for, it must be able to be lifted, on a showing that the merger must be consummated or will fall through, and that there is a need for the consummation.

Senator BURDICK. I know this is one of the problems I would like to have resolved, where we are going to have a situation like that.

Ms. FOX. Well, we think that the existing rules governing TRO's and preliminary injunctions are adequate to cure that problem. They allow the court to take financial emergencies into account; and that is one of the reasons why we think the existing rules are proper and good.

Senator HRUSKA. Senator Mathias?

Senator MATHIAS. I am wondering if you considered what sort of human reaction would be in the Justice Department? Senator Burdick raised the question of the Attorney General seeking a restraining order almost as a matter of course.

I think we all know that the Attorney General is not much likely to be occupied with the average run-of-the-mill cases, but if some young Justice Department lawyer would happen to have this file dropped on his desk, and will have to really make the decision, can you analyze what that young Justice Department lawyer is likely to do when that file drops on his desk and this choice is put before him to act in the name of the Attorney General of the United States?

Ms. FOX. Well, we do feel that automatic injunction provisions will be used. We would hope that they would be used responsibly. If an enforcement person had any doubt at all, the enforcement person would get the injunctive relief. That is the reason why we opposed the automatic injunctive relief.

Senator BURDICK. And the temporary injunction will last until the matter is tried on its merits, would it not?

Ms. FOX. The temporary injunction would last until the decision on the preliminary injunction, and then, of course——

Senator BURDICK. And that may be months or years; could it?

Ms. FOX. Yes; except that there is a provision in the amendments proposed by Senators Hart and Scott that it be vacated if preliminary injunction proceedings are not completed within 60 days.

Senator BURDICK. That can be extended.

Ms. FOX. Yes; it can be extended.

Senator BURDICK. OK.

Senator HRUSKA. Mr. Nash has some questions.

Mr. NASH. Thank you, Mr. Chairman.

Ms. FOX, is it not correct that under section 7 of the case law there is something called the "Failing Company Doctrine," whereby if the company to be acquired is about to go into bankruptcy or needs an infusion of capital, or it fits into the category sort of described by Senator Burdick, that the courts have held that such an acquisition is not within the contemplation of section 7, and it would not be deemed to violate the antitrust laws?

Ms. Fox. Some courts have so held. It is a controversial question. The Federal Trade Commission takes a slightly different position.

Mr. Nash. Now, with respect to the 30-day notification provision, possibly forcing an entity to go to bankruptcy because they could not consummate a merger quickly and, therefore, would not get the infusion of capital, is it not correct that under existing standards in S. 1284, as reported by the subcommittee, the governmental authorities (a) have power to issue general exemptions by rule for such transactions, and (b) with regard to any particular merger transactions, they have the authority to waive the 30-day waiting period, and to authorize the companies to proceed and consummate the merger at once?

Ms. Fox. That is totally discretionary with the enforcement authorities, yes.

Mr. Nash. You are an accomplished antitrust counsel, particularly in the section 7 merger matters. Would it be your judgment where one of the companies is in the nature of a failing company, that the antitrust authorities would or would not be disposed toward waiving the 30-day waiting period?

Ms. Fox. Well, with due respect, Mr. Nash, to me, that is not the important question. I want to be sure that there is an opportunity, apart from the discretion of the Attorney General, for a financially needed merger to go through. I want the discretion not to lie, of course, with the authorities, but for there to be either the power of the court, under ordinary TRO preliminary injunction standards or else a preexemption.

Mr. Nash. Well, we are talking here of the 30-day notification period that Senator Burdick was concerned with, not with what standard should apply for the preliminary injunction.

Ms. Fox. What I am saying is that I do not—although, of course, the antitrust authorities have discretion not to require the 30-day waiting period—I do not think that is enough in certain emergency situations. I do not think that that is enough to rely on.

Mr. Nash. So would you counsel the committee to draft a further exemption—say, exemption No. 12—for failing companies or emergencies? Is that the essence of what you are saying?

Ms. Fox. No. I do not think that they should draft it that way.

Mr. Nash. I have no further questions.

Senator Burdick. Well, what I am fearful of is that the prosecutor is going to take the safe side and not consent to this exemption; that he will want to do a little studying on this matter. That is what I am afraid of.

Ms. Fox. There is also a question about what is a failing company, and of possible prosecutorial skepticism when a company says that it must merge because it is failing.

Senator Hruska. Have you a question?

Mr. O'Leary. Yes; Ms. Fox, with respect to Senator Mathias' question about how the individual in the Justice Department performs when the file is dumped on his desk, and whether or not he is going to seek a preliminary injunction, the Government seeks very few· does it not?

Ms. Fox. I do not really think I could answer that question. There are quite a number of injunctions granted.

Mr. O'Leary. Our research shows that from 1955 to 1975 the Government sought 62 preliminary injunctions, or approximately 3 a year. Is it a fair statement to say that when the Government seeks a preliminary injunction, it generally loses?

Ms. Fox. I do not know what the statistics are, but I would not say that that is a fair statement. I think the Government's likelihood of getting preliminary relief depends on the strength of the Government's case.

Mr. O'Leary. Well, once again, with respect to those 62, the Government was successful in less than one-third.

Ms. Fox. Yes; what I am saying is that this might reflect on the merits of the Government's case. In addition, I might point out that since the Expediting Act was amended, if the Government loses—and says that it should have won, but it lost because it had a judge who was just unsympathetic to the Government, and should not have been, under the circumstances—the Government has recourse now to the circuit court. And I regard that as a very good development. I regard that as important backup.

I do believe that if the Government has a reasonable probability of success, it will get preliminary relief at the district court; at the least, in most cases, assuming justice is carried out, it will get the relief from the appellate court.

Mr. O'Leary. Would you agree that in attempting to secure adequate relief after trial or, as often say, "unscrambling the eggs"—that it is pretty difficult 2 or 3 years down the pike, after trial?

Ms. Fox. In stock acquisitions, it may be less difficult. Of course, in asset acquisitions it may be more difficult. There are certainly problems of divestiture after mergers are consummated.

Mr. O'Leary. Well, our research shows that the Government is successful at the trial stage in almost 90 percent of the section 7 cases—excluding banking cases—it files.

Ms. Fox. Other than bank cases?

Mr. O'Leary. Yes; now, given the fact that the Government wins 90 percent of the cases at or after trial on the merits, and that relief after trial is difficult, is it so wrong of us to attempt to shift the burden with respect to the standard by which a preliminary injunction will be granted or denied?

Ms. Fox. I still think your equation eliminates the important fact of whether the Government had a reasonable probability of success. If it looks like the Government should win, if it looks like the merger is probably illegal, and if the Government should take the effort to go to the court on a motion for preliminary injunction, it will get that relief and not have to face the problems.

You do have the other type of case where it looks like the merger is probably legal; but anything can happen, and the defendant might lose in the end. There might be relief problems, but it looks to us that this defendant, where it looked like the merger was probably legal, should not be penalized.

Mr. O'Leary. Is not that saying that because the Government is wrong 10 percent of the time, we are going to allow a lot of mergers

to go through that are ultimately going to be determined to be illegal; and relief 3 and 5 years down the road, as a practical matter, is pretty difficult?

Ms. Fox. You must be assuming that in such cases a preliminary injunction was sought and denied. I am sure the statistics do not bear that out. If the Government is right 90 percent of the time, it will get a preliminary injunction 90 percent of the time. Indeed the standard for preliminary relief is lesser than the standard for judgment after trial. If the Government can prove that it is likely to win, it gets preliminary relief. It has to prove that there is a violation to win at trial.

Mr. O'Leary. Thank you.

Senator Hruska. Now, we have Mr. Millstein, unless there are any further questions.

Mr. Millstein. I am going to take just a couple of minutes to finish up. I would like to be sure, however, that there are no further questions of Mr. Pollock and Ms. Fox and Mr. Holmes, before I go on, because I think they dealt with the major subject matters.

Senator Hruska. I will have a couple of questions of Mr. Pollock.

Are there any legitimate standards, Mr. Pollock, we could adopt now on limited investigatory authority which title II contains, such as by permitting its use only if it is needed in order to draft an antitrust complaint, instead of razing the fields—and almost indiscriminantly—in terms of law enforcement or low activity? Instead of doing that, direct it more particularly and usefully and truthfully?

Mr. Pollock. I think that it would be a very worthwhile inquiry. I think that is the kind of thing that perhaps we should respond to by letter, that is, whether there is or it would be possible to develop some verbal formulation which would, at least to some extent, restrict the unlimited discretion which is conferred by this bill. I think we would like to consider that and respond to the Senator.

Senator Hruska. On another point. With all of the new reports and documents that will be required under the proposed provisions in title II, do you think it would be well to make sure that all copies and originals of documents are returned after the investigation is over, so that the Antitrust Division does not become a gigantic data bank?

Mr. Pollock. I think that the bill does, Senator, provide for the return of documents. The difficulty is that it also provides a variety of new ways, not now permitted by the Antitrust Civil Practice Act, for the disclosure of previously confidential information. It provides, for example, that the information could be used by other Antitrust Division attorneys in connection with other matters. Information could be turned over to the Federal Trade Commission, for whatever use it wishes. It also provides that the information can be used by Division attorneys in connection with the oral interrogation about which we spoke earlier, so that information obtained through one CID could be disclosed through witnesses at these depositions, at the discretion of the Division attorneys, thereby, we think, largely emasculating many of the confidentiality protections which were built into the 1962 act.

Senator Hruska. A final question on title II. When innocent parties are brought in, third parties not parties to the action, the case is even

more compelling in regard to the question I will now propound: and that is, in many instances, considerable expense will be incurred by the witness, much time, and the employment of counsel and so on, all because they are called upon by the Antitrust Division of the Department of Justice to enable the Department of Justice to perfect a case—to build and perfect a case. Normally, when the Antitrust Division undertakes to build up a case, they have to pay for the services: they certainly have to pay their own attorneys. Now, they are imposing upon people who have no interest in it, and who are third parties. Considerable hardships and great expense would be visited upon them. Should there be some provision for paying for reimbursing, for expenses incurred and payment of counsel fees and witness fees, and the time of such witnesses, whether they be companies or natural persons?

Mr. POLLOCK. Well, I think a provision that would be designed to provide for the reimbursement of certain expenses would be entirely reasonable. I was struck, Senator, by the absence of any provision in the bill even for payment of the customary witness fees or for payment of expenses of the witness involved in traveling to the place where he must appear for the interrogation.

The problem is compounded by the fact that the bill provides that the witness can be compelled to appear any place in the country where he transacts business. So that if you have a business executive who, from time to time, engages in business in a variety of cities around the country, the bill would enable the Justice Department to compel that man to appear at any such place, without any provision whatsoever for payment of his expenses, counsel fees, or any other expenses that might be incurred in that testimony. That omission would seem to me to be exceedingly unfair.

Senator HRUSKA. Thank you.

Senator Burdick, any further questions?

Senator BURDICK. No.

Senator HRUSKA. Senator Mathias?

Senator MATHIAS. Just one, Mr. Chairman.

There has been some discussion about the compulsory process of targets——

Mr. POLLOCK. Yes, Senator, which is the limitation of the present statute.——

Senator MATHIAS. Is that, in your judgment, adequate, given the importance of obtaining information from third parties? Do you feel that we should retain the limitations?

Mr. POLLACK. Well, let me answer it this way: My practice has been with both the Department of Justice, in earlier years, and with a private firm thereafter, and throughout this period involved in antitrust matters, and it has never been my experience that the Department of Justice has been, in any way, substantially impeded in obtaining information from third parties.

I was also struck by the conspicuous absence in the statements of Assistant Attorney General Kauper of any showing that effective antitrust enforcement has been impaired without such compulsory powers, apart from a conclusory statement of Mr. Kauper that such compulsory powers would be useful to the Department. I do not know of any showing of need. And it has been my experience that the Depart-

ment has vast resources at its disposal to obtain the requisite information from third parties without the necessity of using the kind of sweeping powers that are proposed in this bill.

Senator MATHIAS. Well, you call them sweeping powers, but it is a fact that a third party would have a right to quash, as a matter of fact?

Mr. POLLOCK. No, I don't think that he would have any such right.

Senator MATHIAS. Well, he could move if he does not have such right.

Mr. POLLOCK. The difficulty, Senator, is that, so far as I am aware, he would have no grounds for obtaining such relief, no matter how innocent he may be, no matter what his knowledge may be, no matter how tangential his relationship, no matter how arbitrary the Division would be, because the test is that whenever the Assistant Attorney General has reason to believe that a third party, or any person, may have information relevant to an antitrust investigation or to regulatory or administrative proceedings, he may issue a CID. Now, given that kind of authority, Senator, even if there were, theoretically, some right on the part of that person, and assuming that he had the resources to employ counsel to go to a U.S. district court to seek relief, it would seem that the U.S. district court, in those circumstances, under this bill as it now stands, would, I assume, have no alternative but to say, "I can give you no relief, and you must obey the subpena, and you must testify as provided."

Senator HRUSKA. Mr. Millstein, have you something to add to that?

Mr. MILLSTEIN. Yes. In our position statement, Senator Mathias, we are very careful to point out that while our basic position is we are against the extension of the power, we also add a number of safeguards. So that if you were to grant the power to go after third persons with the CID, at the very least, you ought to build in the kind of safeguards that would permit the witness to go to court and object. The kind of safeguards we were talking about were identification of who the target is, the nature of the proceeding, the laws involved, and so on, so that he could go to court and show the judge: "This is what they are after, and this is the nature of the investigation; the two don't match. I'm being overburdened; this is harrassment," et cetera.

Senator MATHIAS. To air the complaint.

Mr. MILLSTEIN. At the least.

Senator MATHIAS. I was just going to ask counsel to comment.

Mr. NASH. Thank you, Senator Mathias.

The language in the bill will speak for itself, but I would ask the chairman to accept for the record a January 22, 1976, letter from the Assistant Attorney General Thomas Kauper,[1] which specifically states the reasons that the 1962 act was insufficient, and enumerates case after case, in which the Department was unable to efficiently and promptly pursue investigations because of such inadequacies.

Senator HRUSKA. Would you identify for the record what is its date and to whom is it addressed?

Mr. NASH. It is dated January 22, 1976, to Hon. Peter W. Rodino, Jr., chairman of the House Committee on the Judiciary, and it spe-

[1] See p. 231.

cifically refers to H.R. 39, which is the House equivalent to title II of S. 1284.

Senator HRUSKA. Without objection, the request is granted.

Mr. NASH. Mr. Pollock, is it or is it not correct that the standards in existing law under the Antitrust Civil Process Act, which are continued and contained in title II of S. 1284, require a civil investigative demand to be relevant to the antitrust investigation, and requires the nature of the investigation to be stated in the CID; that the compulsory process must be limited to documents in the possession, custody, or control of the subpenaed party; that the CID must be drafted with definiteness and certainty; that a reasonable period of time must be allowed to comply with the CID; and, most importantly, does it not allow a party to simply decline to comply with the CID, without that party being in any peril whatsoever unless the Department of Justice decides to take the recipient before a judge to explain why the CID is not being complied with; and is it not correct that only after a judge makes a review of the legality of the CID must the person then comply with it?

Mr. POLLOCK. Well, if you are asking, Mr. Nash, whether the present Antitrust Civil Process Act might appropriately be amended, in light of the experience which has been had under the 1962 act, I would remind you that we do, indeed, support certain amendments where problems have arisen; in particular, the matter of dealing with planned mergers, which are now excluded from the scope of the act. We would support even the extension of CID power to natural persons when they are targets to the investigations. And we think there may also be, approximately, written interrogatories to such targets.

I am speaking on a personal basis now, since this is not part of our resolution or our previous discussion—if the present penalties in the Civil Process Act are insufficient to require adequate cooperation on the part of those who receive CID, I think that much could be said toward appropriate amendment in that respect. We are not opposed to appropriate changes. What we have tried to bring to the attention of the committee here are more fundamental problems involved in an essentially revolutionary expansion of the scope of the present CID.

Mr. NASH. I take it you do not agree, then, that the particular requirements for and safeguards underlying the issuance of the CID, which I enunciated, are contained in the existing CID statute and are continued under S. 1284?

Mr. POLLOCK. No; we would not agree that that would be continued at all. For example, the present limitation with respect to the production of documents, the present limitation with respect to targets in investigation, the present limitations with respect to confidentiality, would all be abandoned under the provisions of this bill.

Mr. NASH. But the limitations of relevance, possession, custody or control, definiteness and certainty, reasonable period of time, the absolute right of recourse to a judicial determination before one is in jeopardy—safeguards such as that—are they not in title II?

Mr. POLLOCK. No, no, no—that is entirely incorrect. This bill provides criminal penalties which did not exist before for any such witness, no matter how innocent, for failing to appear at the Department's offices to testify in this kind of secret hearing. It provides a

whole variety of different procedures which are unprecedented in terms of the 1962 legislation.

In addition, there is no provision whatsoever, for example, for even identifying what the purpose of the CID is when the CID would be issued with respect to some regulatory or administrative proceeding.

This bill—and I think your question highlights it—takes almost each and every one of the safeguards which were the subject of so much discussion in the years prior to 1962 and negates them, and changes the bill into something that the statute is not today.

Mr. NASH. I have no further questions.

As I originally stated, I believe the members of the committee will have to read the bill and make the judgment as to what it does or does not contain.

Senator HRUSKA. They will, indeed. And may I say this, that those elements and those provisions found in the pending bill were discussed in particular and in depth in 1962, when the civil investigative demand that is now on the books finally evolved from the legislative process. And in that regard, of course, when they reinstated the same objections adhering to them at that time, 14 years ago, are still there—they are still there, and are not cured by the provisions in present law, which do not apply to them because they have no occasion to apply to them. Does that follow, Mr. Pollock?

Mr. POLLOCK. I think that is absolutely true. As I indicated in my remarks earlier, during this 14-year period, without the necessity of making specific references to matters that have come before the Congress, we certainly cannot say that our experience has been such that would enable us to say that the values and objectives which were expressed in 1962, particularly with respect to executive power, the potential of abuse, and prosecutor excess, we cannot say that our experience demonstrates that those concerns are any less valid today than they were in 1962.

Senator HRUSKA. Any further questions?

Mr. NASH. No thank you, Mr. Chairman.

Senator HRUSKA. Mr. O'Leary?

Mr. O'LEARY. No.

Senator HRUSKA. Very well. We will recess at 12:30. If there is a desire to read the other statements and to participate in them, we can come back, but not until 3 o'clock because of other commitments.

Mr. MILLSTEIN. I believe we can wrap this up in 5 minutes.

Senator HRUSKA. Now, you have further text in your statement with reference to titles I and III——

Mr. MILLSTEIN. I, III, VI, and VII.

Senator HRUSKA. Now, all the statements which you have prepared and submitted and which have not been read will be incorporated into the record in toto.

Mr. MILLSTEIN. Thank you, Senator.

And we will not burden the committee with the recitation of that at the moment. I would like to summarize the positions on each of those titles.

Senator HRUSKA. Very well.

Senator MATHIAS. Mr. Chairman, when any witness says he can wrap it up in 5 minutes, there is a strong presumption of impossibility.

But let me say, in Mr. Millstein's case, the man who can resolve the problem of New York City may be able to resolve this.

Mr. MILLSTEIN. I would like to say, in summary, that the colloquy which occurred between all of us and all of you demonstrates the fact that this is a lawyer's bill, and it is highly technical. And, without any opprobrium at all, we urge that everybody study this bill and study our text and compare the two because we have gone to great pains not to argue and not to fight, but to demonstrate where we think the problems are and what additions could be made to improve the bill. Let me just race through the end of this.

With respect to title I, we have a fairly extensive submission which is being made. And all we are suggesting is: Why get into this fight in this bill?

This bill is a procedural bill. Yet title I contains many highly disputed issues of economics concerning primarily concentration. We would vigorously urge the committee to forego making findings on concentration at this point, especially when those findings are not founded in a consensus and really are not necessary. We would like to avoid an argument about title I at this point. You do not need it. It is not germane. It should be eliminated.

Title III is the so-called FTC provision of the bill. The key point we would like to make to you is that this provision has been suggested to be simply a codification of existing law. It is not simply a codification of existing law. And the paper which we have submitted to you, citing page and verse, will demonstrate to you that it is not a codification of existing law. It is a significant change in existing law which will severely limit respondent's ability to contest FTC process. We urge that our position be studied carefully because we think a significant change is being made in the law which, in effect, attempts to permit the Commission to go to court and obtain a rubber stamp of its orders, without giving the respondent a full opportunity to debate the propriety of the Commission's process. All we are seeking with respect to title III is an opportunity for a respondent to go to court and contest the propriety of the Commission's process.

Title III is not a codification. It is a very very significant change. Indeed, it overrules a case in the third circuit decided about a month ago. *A. O. Smith* v. *FTC*, where the court held to the contrary of what this particular provision would do. The court held that a respondent does have the opportunity to obtain preenforcement relief against the Commission. This bill would attempt to remove that. And so title III would in fact change the law by overruling a third circuit decision.

As far as title VI is concerned, we understand that the Hart-Scott proposed amendments would delete the nolo problems. We applaud that and hope that the committee will adopt it.

Title VII contains a variety of provisions, many of which the Assistant Attorney General in charge of the Antitrust Division has opposed. Sections 701, 702, and 703; I think each of them ought to be looked at because we agree with the Assistant Attorney General in charge of the Antitrust Division. Most of these provisions should be deleted or seriously altered. The key provision I would like to call to your attention is section 701 in title VII, which expands the jurisdiction of the Robinson-Patman and Clayton Acts to matters only affect-

ing interstate commerce. There we have the anomaly that while the Robinson-Patman Act is being severely attacked and many people are suggesting that it be dropped or changed or modified, a suggestion is made not only not to do that substantively, but to increase the number of matters to which the Robinson-Patman Act would apply by letting it reach matters, really, very local in nature.

Well, that is a very quick summary of those points, but I suggest that our submission is complete. Again, in winding up, we do appreciate the opportunity you gave us. Two and a half hours before this committee is a huge amount of time, knowing how busy you are.

We close on the same note we opened with; by stating that S. 1284 is a lawyer's bill. It is not easy to debate it fully in forums such as this. This is precisely why we have given you a rather lengthy statement.

If there is anything else that we can do in terms of responding to questions the four of us are available to come down to answer questions. We want to assist and be of some help in improving this statute.

Thank you very much.

Senator BURDICK. Mr. Chairman?

Senator HRUSKA. Senator Burdick?

Senator BURDICK. Because of the shortness of time, I did not ask these questions. I have a few questions that I would like to ask. Who should I direct them to?

Mr. MILLSTEIN. Well, if you would direct the questions to me, I will see that they are properly directed to the person who can answer them.

Senator BURDICK. May I ask leave to have the answers placed in the record, the questions and answers?

Senator HRUSKA. Indeed. Senator Mathias?

Senator MATHIAS. No questions, Mr. Chairman.

I think that Mr. Millstein has made an interesting point in his statement in which he refers to the fact that section 1 of the Sherman Act does not prohibit concentration. Section 2 does not prohibit bigness alone; it prohibits acts and observations. It raises the danger if we move to stretch those standards. And we have moved a considerable degree in that direction already.

Mr. MILLSTEIN. All we would like to do is call your attention to it.

Senator MATHIAS. No. I think maybe you get closer to the philosophy of the problems that we have in that proposition.

Mr. MILLSTEIN. Thank you, Senator.

Senator HRUSKA. By way of conclusion, as far as the acting chairman of this subcommittee is concerned, I would suggest that the hearing this morning proves the point that has been made by each of you. It is one that I had stressed a good deal when these hearings started, seven titles, seven bills in one bill.

Now, the other body has many attributes which we admire and some of which we hold in question. But let me suggest they took 14 months on parens patriae alone, and they processed it twice in the subcommittee, twice in the committee, got a rule last week, and I think they are going to consider it this week. Here, in the space of 2½ hours, we hear four eminent authorities of the legal profession who have specialized in this field of the law covering seven bills.

And I submit that the detail has not been sufficiently plumbed in the last 2½ hours in any one of these bills. And I think that is a fundamental defect in trying to legislate in this very vast and intricate and vital field of the law. having 86 years of history, and here we are doing violence to some of the basic original tenets of that legislation. And I would like to take exception to the precedent, once the approach is made, of this bill. And I shall elaborate on this subject when we get to the floor.

Senator MATHIAS. I hope the Chair will demonstrate some ability to evoke extraordinary performance from the——

Senator HRUSKA. Well, of course, we will have the markup starting Thursday and we will have 16 hours of you. And that will help a little bit. But, again. I want to say that there will be a limit of 16 hours of markup session devoted to seven bills, each of them very difficult, complicated, complex, long legislative history. We could take that much only on the civil investigative demand and, in fact, we took many, many more hours than that in 1962 to pound out what we did in the Civil Investigative Demand Act of today.

Anything further, Senator Burdick?

Senator BURDICK. No.

Senator HRUSKA. Senator Mathias?

Senator MATHIAS. No.

Senator HRUSKA. We will take a short recess. We have one more witness to hear from today after the recess.

Thank you for coming, each one of you.

[Recess.]

Senator HRUSKA. The subcommittee will come to order. The next witness is Milton D. Stewart, president of the National Small Business Association.

Mr. Stewart, you have submitted a copy of your statement together with excerpts and attachments. The entire statement will be incorporated in the record. You may now proceed with your summary and your statement promptly.

Mr. STEWART. Thank you, Mr. Chairman.

STATEMENT OF MILTON D. STEWART, PRESIDENT, NATIONAL SMALL BUSINESS ASSOCIATION

Mr. STEWART. I much appreciate your courtesy in letting me proceed. I should say for the record that I am chairman of the board of a company called Terra, California. I am also a lawyer and a member of the bar of the District of Columbia and the State of New York, although I want to emphasize that I do not appear here out of any presumed expertness with respect to antitrust law.

I have five or six points, Mr. Chairman, which I can summarize very quickly. No. 1, small business in the United States has historically the feeling that it has been caught in a crossfire between antitrust zealots on the one hand, and counsel for major corporations on the other, not necessarily intended. Our appearance here is really to express our hope that this will not be an occasion when we are caught in a perilous crossfire between the consumer on the one hand, and the Government on the other.

We urge the committee to consider a forthright but careful exemption from title IV, our principal concern, the parens patriae provision, for small business. And we suggested a structure for the exemption relying on existing law and regulation as provided in the Small Business Act and the regulations of the Small Business Administration. It was also suggested that the exemption be limited to keep it from becoming a loophole and to keep it from hampering investigation and enforcement. Our reasons for urging the exemption are perfectly forthright. If our purpose is to confer the ability to defend consumer interests which are small individually, but enormous in the large, these interests do not arise as a result of antitrust violations by small companies unless large companies are involved. And we've provided here that in such instances our proposed exemption would be limited so that small companies could be named as codefendants for the purpose of asserting jurisdiction and maintaining investigation and enforcement.

We have given other reasons for our exemption. Our own experience with regulatory process is that time and time again statutes, regulations, unless they distinguish between large and small companies, wind up with the burden of enforcement that is unequal and in general create what I have called a totally synthetic and indefensible noneconomic advantage of scale to bigness. It is suggested also that this kind of exemption has proven that the Congress can always eliminate it far more easily if it turns out to be unwarranted or to leave loopholes, then it can come back and take it out after the failure to provide it exposes many small businesses to the risk of very severe consequences.

And finally, Mr. Chairman, we have made it perfectly plain that we do not suggest in the slightest that our request for an exemption reflects any diminution in our historic determination to see the antitrust laws strengthened greatly compared to what they have been. Because our experience in the marketplace and the world of business is that they have, in the large, failed in terms, not perhaps of the niceties of legal objectives which the antitrust bar is concerned with, but in terms of the public policy which underlies in the maintenance of competition in the marketplace. We must report to this committee that 86 years have gone by; the economy is more concentrated than ever, mergers, I think you will find, about to erupt again in a form and at a size scale which will make us look back 10 years from now and wonder why we let them happen.

We suggested that the greatest peril that confronts this committee in deliberating on this bill is perhaps not that it will do procedural harm to large company defendants by failing to extend to them all the remedies and all the rights that we know all of us want to enjoy, but perhaps leaving the general public with a feeling that its diminishing confidence in the enterprise economy is warranted. I cannot say this too strongly. The American people, I have tried to say, have been putting out in warning flash of every kind and color to all of us about their growing hostility to bigness.

Mr. Nader, in his statement last spring, cited one survey. I have others which I will be happy to furnish for the record. This is a matter, I think, that should be of great concern to the Congress in strik-

ing balances about procedural needs and substantive advances. Other evidences of the dangers of bigness—and I for one am not troubled at all by seeing this proposed statute extend the statement of purpose of the antitrust laws, because I think it is warranted. We must, if we are going to be candid with one another, acknowledge that we have reached the point in many industries where we have not just concentration but a diminution of capacity to serve the American people that becomes clearer every day.

We have a faltering technology. Business Week, and we will furnish this for the record,[1] two issues in a row have talked about the failing R. & D. of technology incentive, technology innovation that characterizes our economy, and attributes it openly to bigness and concentration.

We have seen, in our own view, other failures nationally as a result of concentration. Perhaps the most dramatic one, in my own experience, with my own reading of American history, only in the Civil War and the Great Depression and World War II have we suffered a calamity as great as the energy crises. In my own view again, I think we miss the point if we do not acknowledge that it came about as a failure of big companies as well as big government.

Let me conclude on this note, Mr. Chairman. Small business has been well treated over the years in terms of attention by the Congress. Unfortunately, we have found that Congress has divided in its approach to the problems of small business between those on the one hand concerned with the excessive growth of big government, and those on the other with the excessive growth of big business. We must be concerned with both, and equally because—I just offer this concluding fact: 15 years ago one out of every four Americans was employed by either the Fortune 1300 or some level of government. Today that number is one out of every three. At this rate, the third century of this Republic will not have progressed very far before all of our children will have to anticipate working either for big government or big business.

We think what you are considering here, particularly title V, bears on this greatly and we just urge as strongly as we can that the Congress acquire perhaps a greater sense of urgency, even conceding the fact that seven substantial measures are here jammed into one piece of legislation.

Mr. Chairman, speaking for myself alone, given only the exemption we are talking about which we think will diminish the possible dangers greatly, given that alone, we think the facts in the business community warrant the enactment of this measure.

Thank you very much.

[The prepared statement of Mr. Stewart follows. Testimony resumes on p. 98.]

STATEMENT OF MILTON D. STEWART, PRESIDENT, NATIONAL SMALL BUSINESS ASSOCIATION

We should like first to express our thanks to this Committee for its consideration and responsibility in giving us this opportunity to be heard. This is an appropriate point for us also to record our thanks to Senator Thurmond for

[1] See p. 714.

sponsoring our Job Creation Credit Bill. That's an affirmative proposal to expand small business rather than big government in the fight to reduce joblessness. Our appearance here is to make sure that this Committee's effort to strengthen antitrust enforcement in the interest of the consumer is directed where it ought to be—at big business rather than small business.

This is also a proper place to say three things to Senator Hart. This country's history will one day record a debt which its people owe to him for his tireless, often lonely fight to focus attention on the problem of economic concentration. Like many, too many others, we in the small business community have not given him the support we should have given him. He (and, as it happens, Senator Scott, his colleague in the sponsorship of this bill) are closing many years of distinguished service in the Senate. You may be sure that this is one small business man and lawyer who will, in the years ahead, do what he can to see that these good men have not fought this good fight in vain. We have something to make up for.

1. We recommend strongly that an express, but carefully drawn exemption for small business be written into Title IV of S. 1284 (Parens Patriae).

The exemption we recommend should provide that Title IV will not apply to any enterprise (including one engaged in licensed professional practice) which qualifies as a small business under any of the definitions of "small business" provided in the regulations of the Small Business Administration.

To reassure those who fear that this may be used as a loophole, the exemption should be limited further to enterprises which, with affiliates, have fewer than 1,000 employees and less than $10,000,000 in annual sales (or any other numbers the Committee finds appropriate). This will preclude any unintended "slippage" of jurisdiction. The exemption should be further qualified to allow the naming of small businesses (without opening them to liability) as co-defendants where they are alleged to be indispensable parties in complaints against large companies. This will preclude the misuse of the exemption to hamper investigation and enforcement.

Our reasons for urging the exemption:

(*a*) We do not believe State Attorneys General need new authority to go into Federal courts to defend consumers against small businesses in class actions. In the rare cases where small companies violate the antitrust laws with damages to consumers, it is only the involvement of large companies which will produce the mass of impacted persons warranting class actions at all.

(*b*) There is simply no adequate justification—even a theoretical one—in potential benefit to the consumer for extending this measure to small businesses. The issues involved will involve too few people and too little money to warrant the costly process and the severe sanction.

(*c*) Not to provide the exemption, however, is to expose small companies to a risk of distorted "cheap and easy" enforcement. An anonymous FTC official made one of the rare public admissions of the existence of this regulatory approach last Fall. He was quoted by the Wall Street Journal as having said that the Commission staff was finding the going too tough against big companies; they resisted too successfully because they could afford protracted delaying legal maneuvers. Therefore, he said, small companies would be the target of enforcement first. They would just give up earlier and concede legal issues because of their inability to survive or even finance long litigation. Then, he said, the results could be used against larger companies.

(*d*) Over and over, we have learned that when the same restrictive law is applied to large and small companies without distinction, the result is inequality of treatment because of the far greater ability of large companies to defend themselves. Until Federal laws confer burdens and benefits on businesses with some regard for their size, they will continue to be an important force for economic concentration. Their spurious equality of treatment actually adds a totally synthetic and indefensible non-economic "advantage of scale" to bigness.

(*e*) It only makes enforcement and jurisdictional common sense to begin this untested program with the highest priority problems—those involving the greatest number of consumers and the companies with the largest impact. Should the Attorneys General find, from experience, that the exemption is not warranted or is inhibiting, the Congress can always remove it. It is far less prudent and more dangerous to determine need by inclusion. That risks the unfair and disastrous exposure of many small companies to ruinous consequences. (See letter of Frederick Rowe to Senator Thurmond, February 17, 1976, and letter of John Lewis attached.)

(*f*) We have no desire to allow the gravity of Title IV's possible application to small business to provide a convenient screen for big company resistance to proper public policy in defense of consumers. Congress should decide that issue on its own merits without the distraction of small business involvement.

2. With the exemption we have recommended, we believe S. 1284 should be enacted promptly with the support of all Senators concerned with the future competitive position of small business.

Small business may appear, at first blush, to have little to gain directly and "selfishly", if you will, from S. 1284. Title IV's limitation to "natural persons," for example, means that small companies will not be able to use it directly to defend themselves against antitrust abuses. Nevertheless, we believe S. 1284 will strengthen the antitrust laws enough to warrant our support. This Committee will never, for example, satisfy the legal gladiators and hired guns of the antitrust bar with this or any other bill. Nor will you get complete unanimity among the economists who spin out their differing airy-fairy definitions and proofs and disputations and propositions; they have as much to do with the real world of business as a collection of spider webs. The record shows you have a remarkable degree of support from them already.

What S. 1284—particularly Title V—may do is to help a little to slow down the next wave of merger madness. With signs of a reviving stock market, that's already being prepared in Wall Street, LaSalle Street and Montgomery Street. The press has reported the open opposition to Title V of the investment bankers. They are so often the prime movers and the engineers of big company mergers that you may take their opposition as a good sign that you are probably on the right track. We say this with full awareness that small companies often want and need mergers to achieve liquidity for stockholders or other benefits. And we freely concede that a relatively rare big company merger may be economically defensible. The strengthened notification procedure will hardly be a significant impediment in those cases.

I have taken the liberty of attaching excerpts from a statement I made just two weeks ago to the Senate Committee on Banking, Housing and Urban Affairs. It too was concerned with mergers. The Committee on Banking was considering the facts in the attempted takeover of a company called Microdot by General Cable and Microdot's management's only defense: selling out to an even bigger company called Northwest Industries even though it really wants to stay independent. You will, I think, find the facts of that case pertinent to Title V of S. 1284 and we do not support the suggestion that surprise takeovers be exempted from it.

Small business' greatest stake in S. 1284 may not relate to any one of its specific provisions at all. We've seen the antitrust laws sliced up into ineffective procedural baloney by big business lawyers to expect too much from this one set of changes. What should concern us most right now is what passage or failure of S. 1284 will do to opinions among two groups of people—one very small (big business management) and one very large (the American people). Small business wants very much to hold the confidence of the American people in the enterprise system. Big business, with some help from big government and big labor, is losing it for us at a frightening pace. We know, and we think big business needs to be reminded—and reminded hard—that the enterprise system rests on the same public opinion, the same mechanism of consent as our system of government. For some five years at least, if I read the polls correctly, the American people have been putting out warning flags of every kind and color to all of us about their growing hostility to bigness. (See p. 146 of Committee hearings on S. 1284 citation of Opinion Research Corp. studies by Nader and Green.)

We will ignore those warnings at our peril. Too many big company boards continue to live in a dream world in which public disenchantment, even contempt, for business is treated as a public relations problem, or the result of antibusiness propaganda, or a media concoction, or just politics. Small business knows it isn't. It's a realistic, understandable public response to the very real abuses of bigness—among many other things, corporate political payola at home and abroad, our faltering technology, the disastrous failure of big oil as well as big government to level with us about energy for the 15 years after OPEC was formed and before it lowered the boom. If you pass S. 1284, you will buttress a little the confidence of the American people that the Congress is awake and aware of the need to take its small steps to make antitrust en-

forcement more effective. If you don't pass it, it will be taken as just one more proof that bigness is now so far out of control that even the shadowy and tentative measures of procedural and notice improvements can't be made any more.

For what it's worth, the passage of S. 1284 and bills like it are also an important—if indirect part—of the biggest big business need we have: the need for a new and better definition of management's fiduciary duty to shareholders. The way it reads now it doesn't matter what you do to show growth and improvement at the bottom line. Earnings are to be bought, if necessary, by acquisition or even bribery. Losses are to be hidden and tax sheltered by other mergers if they can't be hidden. The more companies you acquire, the more money you can borrow against their assets. And the more you borrow, the more you have to buy more earnings to get your stock price up so you can borrow more to buy more, and on and on and on. (Some day some really good economist will figure out how much the capital formation needs of big business are merely reflections of excessive borrowing and leveraging to make acquisitions.)

What we need is a better definition for all big business men—one that says you also have a fiduciary obligation to the enterprise system as a whole and all its stockholders, employees, customers and suppliers. That means your obligation to increase the return on investment to your own stockholders is qualified by your duty to maintain an economically diverse system for all stockholders. Otherwise you threaten the system itself. That means you reach a point where you don't acquire, without divesting, where you fight for earnings the harder way yet—getting more of them from the assets you already control.

Those are the two most important reasons for Congress to enact S. 1284—and to go beyond it. Small business knows that the end of the golden merger and acquisition escalator is not a stronger enterprise system; it is state socialism for which big business is laying the foundation with its ceaseless drive for size. Small business knows that it will take far more than S. 1284 to recover and strengthen the confidence of the American people in the possibility of maintaining a competitive enterprise system. Small business knows that it will take more than S. 1284 to bring big business management to its senses and to a new definition of its fiduciary duty. Small business also knows that Congress' failure to enact S. 1284 will be read as one more proof of its unwillingness and inability to come to grips with the problem of economic concentration.

This Committee will note from the attchment our suggestion that you and the Senate Committee on Banking, Housing and Urban Affairs and the Senate Committee on Finance consider a joint study of mergers and concentration. Antitrust actions alone will not do the job of widening competition and expanding diversity. We must deal with related tax and banking issues. We must take the artificial corporate inducements to size out of our tax laws, and the interlocks and premiums on mergers and acquisitions out of our financial institutions and practices.

You must see our presence here as reflecting the long-term National Small Business Association commitment to a 15-year catch-up program for the nation's small business men. We are determined to restore balance to our economy by having the small business sector outgrow big business and big government in that 15-year period. Part of that catch-up program must be an effective antitrust program. S. 1284 is hardly a complete answer, but with the exemption we have recommended, it's a good step in the right direction.

ATTACHMENT A

NATIONAL SMALL BUSINESS ASSOCIATION,
Washington, D.C., February 18, 1976.

HON. JAMES EASTLAND,
Chairman, Senate Judiciary Committee,
Dirksen Senate Office Building,
Washington, D.C.

DEAR MR. CHAIRMAN: The National Small Business Association is very much concerned about the potentially harmful effects of S. 1284 on small businesses. The parens patriae provisions of Title IV would have a seriously disproportionate impact on small companies who cannot afford the extremely expensive litigation costs to defend themselves against the type of multi-million dollar damage that would be authorized by the bill. Because of their far greater vulnerability, small companies would be forced to settle "blackmail" suits involving enormous damage claims which larger companies named as co-defendants can successfully defend.

Furthermore, the ability of a small company named in such a suit to obtain operating capital would be drastically impaired in view of necessity to disclose such enormous "contingent" liabilities on company financial statements along with a statement evaluating the potential liability. Thus the mere filing of such a suit against a small company, by either a State Attorney or any person "authorized" by state law, would have a totally disastrous effect on the company's ability to continue to do business.

Accordingly, the NSB respectfully and urgently requests an opportunity to present testimony on the serious impact S. 1284 would have on the entire small business community.

Sincerely,

JOHN LEWIS,
Executive Vice President.

ATTACHMENT B

EXCERPTS FROM STATEMENT OF MILTON D. STEWART, PRESIDENT, NATIONAL SMALL BUSINESS ASSOCIATION, BEFORE THE SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, HOLDING HEARINGS ON FEDERAL BANKING AND SECURITIES LAWS AND CORPORATE TAKEOVERS, FEBRUARY 16, 1976

Mr. Chairman and Members of the Committee, my two principal missions in appearing before you today are first, to congratulate this Committee for becoming interested in the problem of corporate takeovers, and secondly to urge as strongly as I know how that you broaden your concern to include the financing and management of all merger and takeover activities—not just those brought about by tender.

Let me point out to you that the General Cable Corporation, according to the most recent issue of Fortune which I have seen, ranked 325th in Fortune's list of 1,000 industrial companies and Microdot ranked 490th. Northwest Industries ranked 182nd. With Microdot's assets it will increase in size from an apparent $1 billion in assets to about $1.220 billion. While you are inquiring into this particular situation, the eighth largest company in the United States with assets in excess of $9 billion (G.E.) is planning to increase its size by acquiring the 336th largest industrial company (Utah International) with assets in excess of $900 million. In another part of the corporate forest the 24th largest company, Tenneco, is wooing the 118th largest, Anaconda; and if they make it, the corporate consequence will have assets in excess of $8 billion. In the meantime, Anaconda is rebuffing another suitor, the Crane Corporation, the 170th largest corporation with assets in excess of $1 billion. If Crane manages to swallow Anaconda—it will apparently be taking over assets twice its own according to Fortune . . .

The sense of foreboding and uncertainty in this country, in my opinion relates specifically to a feeling of estrangement of the citizenry from what used to be its own institutions. I have yet to hear or to read of a major spokesman of American industry saying publicly that there may be some relationship between, for example, the mad rush to monstrous size in banking, industry and commerce and the public's increasing disaffection with both the enterprise system and the government. It is my own view that if over the next 10 years we have another rash of major corporate margers like that of the late 1960's—and I think we are going to have it—within 10 years the leaders of major American enterprise will have forsworn what remains of the basis of public support for the enterprise system.

In my view, they have much for which to answer. But the fault is not theirs alone. The fault is also in Congress and with the lack of leadership in the Presidency on this most fundamental of American issues—the struggle to maintain and expand the economic diversity in which so much of what we value is rooted . . .

As for those vaunted economies of scale, in my experience only three are real and result from mergers of major companies.

First, fewer people make more decisions about larger business matters—if you consider that an economy of scale.

Secondly, raising and controlling capital can be done more effectively and easily because of the way our money market is organized.

Third, influence can be brought to bear more effectively and continuously on the makers of law and public policy.

So far as the National Small Business Association is concerned, we have had quite enough of these economies of scale. Our economy cannot tolerate many more.

Microdot is hardly a small company by government definitional standards. Yet in our economy it is emphatically a small business. It is companies with between $10 million and $500 million in assets which will be the main targets for tomorrow's merger maniacs. I know little about the merits or demerits about the particular conduct of the various corporated and banking managements involved in this matter. But I must confess that experience has taught me to be far less shocked about any of this than the Microdot management has been.

The critical questions for this Committee are not the technical niceties involving the securities laws and the mechanics of tenders. They are only the tip of the iceberg. The critical issues relate to undisciplined large-scale greed for money, for power, for size, masked by a legal fabrication of fiduciary obligation to stockholders . . .

Here are my recommendations to this Committee.

1. Let us clarify our national policies about this matter. Let us begin by amending the Full Employment Act, probably our most fundamental statement of national policy. Let us say that we want a full employment economy but we want it without sacrificing economic diversity and the small business and independent professional sectors.

2. Let this Committee broaden its concern from this particular takeover to the last 50 or 100 large mergers involving companies with more than $100 million assets. Let this Committee find out who really benefits from these mergers, how much, when and why.

We are long overdue for a major review of the inadequacy of national policy governing mergers. This Committee, perhaps through a Special Joint Committee with members from the Senate Finance and Senate Judiciary Committees, ought now to take the time and the trouble to do this job right.

Do we really want Microdot situations happening again and again? Here was a management which apparently did a good job for its stockholders—so good a job that it attracted the attention of a middle-sized corporate shark attack. And to fend off that attack—and others like it—it had to turn to an even larger, if friendlier and fairer, corporate shark.

3. I recommend specifically that the study address the issue of making size alone a per se violation of the antitrust laws. It is time for every responsible elected official in this country to take an open position on when he will become personally concerned about the concentration of economic power in this country. Are we all to wait with Art Buchwald for that happy day when the two surviving companies in America—one East and one West of the Mississippi—finally merge with the blessing of the Antitrust Division? We are not so bereft of wisdom in this country that we cannot devise a national merger policy in which size alone does bring into play the restraint of law and public policy.

4. One of the things we need most is to make the drive for concentration through merger and acquisition a little less profitable for everybody involved in it. For example, when is the public going to get a direct benefit from all these wonderful economies of scale? When are we going to have a sharply graduated business income tax? A capital gains tax related to size and risk as well as holding period? . . .

5. We need a graduated transaction tax on mergers of companies whose assets exceeded, say, $100 million. Even Business Week as discovered in its current issue that there is a "breakdown of U.S. innovation." It has found that "the increasing concentration of products into larger and fewer companies also works against innovation. Radical ideas tend to bog down in big company bureaucracy." And the magazine comments editorially "A careful analysis of U.S. business today suggests that bigness itself may tend to discourage new thinking and new ventures." Proceeds of the graduated transaction tax on mergers which I have mentioned, might well be applied to a new "Special Fund for Innovation and Small Business." Turn it over to the SBA for use in a new revolving fund available for small company experimentation with innovative technology.

It is my experience that the brightest and best brains in Wall Street, La Salle Street and Montgomery Street devote themselves religiously to the relentless hunt for mergers and acquisitions. Why? Because it is the best and fastest way to make money. And one reason it is such a good way is because of provisions

in our tax code. I know some of these men personally. Their talents could be used just as usefully in "demergers" and "unacquisitions" as they are now used to further concentration of industry. All they need is a little encouragement. For example, suppose the Internal Revenue Code imposed a 75 percent surtax on personal, partnership and corporate income derived from mergers with or acquisitions by the thousand or 1,500 largest companies in the country. And suppose on the other hand income from transactions resulting in divestitures which created independent new businesses with more than $100 million in assets were tax-exempt. I have an instinctive feeling that the best and brightest brains in investment and commercial banking would find shiny new virtues in smallness of scale that would make it irresistible to them . . .

6. In the same way, stockholders could be given preferential treatment on other gains or losses to encourage spin-offs, demergers and unacquisitions.

7. One of our ablest Assistant Attorneys General for Antitrust in recent years had what has always seemed to me to be a pretty good idea: for companies above a certain size, no acquisition or merger should be permitted without the simultaneous divestiture of assets equivalent to those acquired.

8. And finally, perhaps we need a specially maintained pool of publicly guaranteed venture capital to make divestitures under antitrust orders more easily financeable.

These will appear to be dangerous ideas to some. They are about as dangerous as Federalist Paper No. 51 and the point it makes about the need for government because men are not angels.

ATTACHMENT C

KIRKLAND, ELLIS & ROWE,
Washington, D.C., February 17, 1976.

Re S. 1284.

Hon. STROM THURMOND,
Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR THURMOND: This letter is responsive to your questions submitted to me following my testimony on February 3, 1976 on behalf of Grocery Manufacturers of America, Inc. in opposition to Title IV of S. 1284.

Question 1. You mentioned Title IV would provide the potential for abuse by the Attorneys General. Would you care to comment further on the apparent authorization of contingency fee arrangements by state officials with private counsel? Can you give me a scenario?

Answer. Section I of my February 3 prepared statement relates to this subject matter, and cites examples from recorded proceedings (pp. 4, nn. 6–7).

In view of the nature of your question, I reiterate, as I stressed throughout my testimony, my assumption of utmost good faith on the part of all State Attorneys General or private counsel concerned.

CONTINGENT FEE AUTHORITY

The apparent authorization of contingency fee arrangements by state officials with private counsel stems from the July 28, 1975 Committee Print's addition to the original S. 1284. The Committee Print redefines State Attorney General, in new Section 4F(1), to include other "authorized" persons, presumably private counsel retained by a State Attorney General.

Since contingency fee arrangements are permissible, and are reported in antitrust litigation,[1] they would apparently be authorized by Section 4F(1) of S. 1284, as revised.

This problem has been recognized by the House Committee on the Judiciary. The Committee's favorable report on H.R. 8532, a proposal similar to S. 1284, Title IV, expressly provides that: "The term 'State attorney general' means the chief legal officer of a State, or any other person authorized by State law to bring actions under this Act, *except that such term does not include any person employed or retained on a contingency fee basis.*" H.R. Rep. No. 94–499, p. 30 (Sept. 22, 1975) (emphasis supplied).

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[1] See cases in note 4 *infra.*

POTENTIAL FOR ABUSE

The magnitude of the antitrust claims authorized by Title IV, by way of claims for all or large groups of state residents, or for the state's "general economy," is obvious.

However, as pointed out by court opinions, large claims filed on behalf of a multitude of claimants, each with a minute individual claim, enhance the potential "conflict of interest" on the part of counsel. Per one recent opinion, "in any class action there is always the temptation for the attorney for the class to recommend settlement in terms less favorable to his clients because a large fee is part of the bargain. The impropriety of such a position is increased where, as here, the attorney is also the representative who brought the action on behalf of the class, and where, as here, the potential recoveries by individual members, including representatives, of the class are likely to be very small in proportion to the total amount of recovery by the class as a whole." *Graybeal* v. *American Savings & Loan Association*, 59 FRD 7, 13 (D. D.C. 1973).

Under existing law, courts in such cases are governed by Federal Rule of Civil Procedure 23. Rule 23 establishes specific criteria and safeguards for class actions. Under these Rule 23 safeguards, Courts have dismissed many such claims, on the basis that (1) issues common to the class did not predominate over individual issues (e.g., *Cotchett* v. *Avis Rent-A-Car System*, 56 FRD 549 (S.D. N.Y. 1972); (2) class methods were inferior to other methods of adjudicating the issues (e.g., *Graybeal* v. *American Savings & Loan Ass'n.*, 59 FRD 7 (D. D.C. 1973); (3) the litigation was unmanageable in terms of notice, administrative costs, and complexity (e.g., *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974)).

However, the present safeguards of Rule 23 would apparently be removed by Title IV, as revised by the July 28 Committee Print, with respect to actions brought by a State Attorney General or "other person" authorized by the state.

I believe his to be so because Section 4C(a)(1) has been changed from the original text of S. 1284 by deleting the prior language which refers to a discretionary judicial authorization of a State Attorney General to act "as a representative of a class or classes consisting of persons residing in that state, who have been damaged." S. 1284, Section 4C(a)(1) (March 12, 1975).

Accordingly, the pre-existing judicial discretion and safeguards under Rule 23 are apparently eliminated by Section 4C(a)(1) of the July 28 Committee Print, which deletes references to classes in suits by Attorneys General.

Consequently, under revised Title IV, the type of case previously dismissed by courts under Rule 23 may be imposed on the courts, notwithstanding abuses of such actions referred to in the judicial opininons cited.

Also, since huge antitrust claims, on behalf of the state's economy or its residents, would be authorized by Title IV, the apparent availability of contingency fee arrangements between state officials and private counsel could become an important incentive for more such actions. An action brought directly by the State Attorney General must presumably be justified by reference to the actual costs to the taxpayer of such antitrust litigation, which may be quite substantial. By contrast, a contingency fee arrangement may eliminate such direct litigation costs for the state, if private counsel is willing to undertake the case on a "contingency" or "percentage of recovery" basis, thus eliminating ongoing financial accountability to the state of the direct cost burden arising from such litigation.

As reflected in judicial decisions,[2] such suits can obtain large settlements, without ever reaching the merits. Particularly smaller firms may settle even a marginal antitrust case, because they do not have the expertise or the resources for an effective defense to complex antitrust litigation, and may be

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[2] See, e.g., *Lindy Bros. Builders* v. *American Radiator & Standard Sanitary Corp.*, 341 F. Supp. 1077 (E.D. Pa. 1972) (settlement of $20 million); *West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd.*, 440 F.2d 1079 (2d Cir. 1971), *cert. den.*, 404 U.S. 871 (1971) (settlement of $100 million). Chief Judge Friendly has pointed out the threat of "blackmail settlements" in such cases. Friendly, *Federal Jurisdiction—A General View* 120 (1973). See generally Simon, "Class Actions—Useful Tool or Engine of Destruction," 55 FRD 375, 389–394 (1972).

exposed to intolerably high contingent liabilities as co-conspirators, jointly and severally, for the amount claimed against all of the dependents.[3]

In sum, the apparent contingency fee authorization by Section 4F(1) of the Committee Print creates new exposures and possibilities of abuse beyond the existing law and beyond Title IV of original S. 1284. For, since the state may have nothing to lose financially in an action brought by authorized private counsel on a contingency fee basis, contingency fee arrangements could serve as an incentive for more such actions.

LACK OF JUDICIAL CONTROLS

As to judicial control of such contingency fee arrangements, I stated in colloquy on February 3 that I had no really fully informative statistical basis and hence could not give an authoritative answer (Tr. 652).

After some further researching of the problem, I still have no definitive statistical basis for an authorizative answer, but have turned up some court opinions which may be significant.

As noted by the courts in reported opinions, including those placed into the hearing record of February 3,[4] the courts are wrestling with the problem of determining appropriate attorneys' fees, contingent and otherwise, in antitrust litigation. It seems evident that the courts still lack any clear-cut and effective groundrules to control excess.

For example, in the *Lindy Bros.* case, the Third Circuit attempted to set up criteria for determining fee awards in antitrust treble damage cases, 487 F.2d 161 (3d Cir. 1973). However, the second district court opinion, 383 F. Supp. 999 (E.D. Pa. 1974), on remand to apply those criteria on attorneys' fees, is still pending on appeal before the Third Circuit, so the application of those principles in the very case which generated them is still an unknown factor.

Moreover, the unreliability of those factors is demonstrated by the most recent published decision of the Third Circuit on December 24, 1975, in *Pitchford* v. *PEPI, Inc.* (Nos. 75–1136 and 75–1137), BNA ATRR (No. 749, February 3, 1976, p. D–1). According to the Court of Appeals opinion:

"In a summary order the trial judge awarded $645,250 as an attorney's fee plus costs—over four times the sum set forth in Pitchford's [i.e. the plaintiff's] application. In his order the trial judge cited *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, but did not adduce any explanation for the amount of the award." *Id.* at p. D–9.

The Court of Appeals reversed that award, and returned it for further consideration and "specific findings and analysis." *Id.* at D–9.

Actually, the one factor which *does* appear consistently from the reported cases is that court supervision of attorneys' fees in antitrust treble damage litigation is a very complex and time-consuming process, which itself can take years to litigate in addition to the years of litigaiton on the merits. In and of itself, this issue casts substantial additional burdens on the courts.[5]

Of course, the reported opinions may be only the proverbial tip of the iceberg. An antitrust defendant may not be too concerned about the split of a settlement fund as between the plaintiffs' monetary recovery and the plaintiffs' attorneys' fees. Only when an issue arises as to an additional award of plaintiffs' attorneys'

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[3] In this connection, the Ninth Circuit's *Kline* decision stressed the $750 million joint and several liability by 2000 real estate brokers, dismissing the class action because the prospect of such exposure "would shock the conscience." *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 234 (9th Cir. 1974). Judge Duniway said, concurring in that opinion, "[M]any of the named defendants will settle for whatever amount they can bargain for, and without regard as to whether they are really liable or not, with a good chunk of the money going to plaintiffs' lawyers." 508 F.2d at 238.

[4] *Lindy Bros. Builders, Inc. of Philadelphia et al.* v. *American Radiator & Standard Sanitary Corp.*, 341 F. Supp. 1077 (E.D. Pa. 1972), *vacated*, 487 F.2d 161 (3d Cir. 1973), *opinion after remand*, 382 F. Supp. 999 (E.D. Pa. 1974) now on appeal to 3d Circuit; *City of Detroit* v. *Grinnell Corp.*, 356 F. Supp. 1380 (S.D.N.Y. 1972), *aff'd in part, rev'd in part*, 495 F.2d 448 (2d Cir. 1974); the opinion on remand is not reported.

[5] The size of this burden is shown by the reported litigation. The *Lindy Bros.* case, started in the *mid-1960's, is still* pending today. It already generated three reported opinions on fees alone, and there will be more as a result of the still pending appeals.

Another significant Third Circuit case on legal fees is antitrust treble damage litigation, *Merola* v. *Atlantic Richfield*, has been going on *from 1971 to date*. It too has already generated two opinions by the Third Circuit, 493 F.2d 292 (1974), and 515 F.2d 165 (1975), as well as two unreported district court opinions, solely on the issue of attorneys' fees. When last reported, 515 F.2d 165 (1975), this case was remanded for yet a third district court opinion.

fees, or when the claimants themselves litigate among themselves over the allocation of attorneys' fees is this issue likely to turn up in reported court opinions.[6]

Because of the nature of this question, I respectfully recommend that the Committee obtain authoritative views beyond those of private antitrust attorneys, since counsel for both plaintiffs and for defendants may stand to gain from the proliferation of such actions under Title IV. Such authoritative views may best come from the Judiciary, or from members of the Judiciary, with direct experience in this area.

POSSIBLE SCENARIOS

As for a scenario, my February 3 statement referred to the possibility of massive antitrust actions, on a contingency fee basis, patterned on the facts of the Ninth Circuit's *Kline* and *Telephone* decisions. The *Kline* case involved alleged liabilities of some $750 million against about 2000 real estate brokers on the grounds that brokerage commissions were "fixed." The *Telephone Charges* case involved claimed damages of $2 each for 40 million people on the grounds that room rates had been raised by a "confusingly mislabeled" charge for telephone services.

My statement also noted the potential of a massive treble damage action, pleaded on behalf of a state's or the District of Columbia's "general economy" or residents, patterned on the recent Federal Trade Commission complaint against the American Medical Association claiming alleged price fixing of doctors' services due to the solicitation and advertising restrictions of the AMA "Principles of Medical Ethics." (FTC Dkt. 9064, Dec. 19, 1975).

Particularly since some of the concerns expressed by others as to Title IV relate specifically to its so-called "general economy" treble damage claim authorization, as distinct from the authorization for aggregate treble damages on behalf of state "residents," it should be stressed that the size of damage claims under the "residents" authorization could far exceed such liabilities under the "general economy" provision as revised in the July 28, 1975 Committee Print.

This is so because a massive claim for treble recovery of "overcharges" on behalf of millions of State residents, paying the alleged "overcharge" in the form of higher prices for a product, or for services, may be substantially greater than a claim on behalf of a state's "general economy" which would be "measured by any decrease in revenues or increase in expenditures, or both, of such State or political subdivision, that may with reasonable probability be causally related to the antitrust violation." Section 4(C)(1)(B). Indeed, any diminished state tax revenues arising from "overcharges" reflected in the higher price of a particular product may be substantially offset by potentially increased revenues to the state from higher taxes by those who collected the alleged "overcharges" in the form of higher product or service prices.

Question 2. It appears that we are now coming out of a recession. What impact, if any, should the passage of S. 1284 have on the economy?"

Answer. The impact of Title IV on the economy is difficult to asses for a non-economist, and I would hence respectfully suggest that the Committee invite the views of objective economists versed in marketing and financial analysis, and also to invite the views of responsible members of the financial community.

Some of the conflcting views as to the impact of antitrust enforcement as an anti-inflationary weapon are collected in a scholarly and documented article by Professor Milton Handler, reprinted in Volume 2 of the Committee's hearings, particularly at pages 624–629.

In my February 3 statement, I expressed concern with the potentially harmful impact of Title IV on the financing and capital access opportunities particularly of smaller firms exposed to huge contingent liabilities arising out of massive antitrust claims. This is so because any business firm, and particularly a smaller firm, which is named as a defendant or co-conspirator in a massive antitrust claim is required by SEC regulations to disclose such "material" liabilities which adversely affect its earnings and financial position. Such disclosures of a multi-million dollar contingent liability, where a recovery cannot be dismissed as remote or impossible in view of the inherent vagueness of the Sherman Act's prohibitions and their judicial interpretation, may preclude a "clean" auditor's

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[6] Both the *Lindy Bros.* and *Grinnell* fee litigations have been among the claimants to the settlement fund. See also *Alpine Pharmacy Inc.* v. *Chas. Pfizer & Co.*, 1973 Trade Cs ¶ 74, 350 (S.D.N.Y. 1972).

report for the company. A "qualified" auditor's report for a business firm, particularly a smaller firm, will obviously be weighed by banks or lender in assessing the safety and risk factors of substantial extensions of credit.[7]

Naturally, the diminished ability of a business firm, particularly a smaller firm, to secure capital financing would have an adverse effect on its growth and ability to generate jobs and employment which are particularly important at a time of emergence from an economic recession.

Question 3. The Antitrust Division of the Department of Justice seems to stay fairly busy. What vacuum will S. 1284 fill?

Answer. I have the highest professional regard for the Antitrust Division of the Department of Justice, and have studied the thoughtful presentation by Assistant Attorney General Thomas E. Kauper at pages 78–119 of the hearings.

Significantly, the Justice Department, while supporting the "basic concept embodied in the parens patriae provisions of Title IV" (Hrgs., p. 93), expressed opposition to the so called "general economy" provisions in Section 4C(a)(2) of the original S. 1284. These provisions, as modified, appear as Section 4C(a)(1)(2) of the July 28 Committee Print.

In my view, an antitrust action on behalf of all state residents could raise the very same "spectre of massive recoveries based upon unquantifiable and perhaps totally unforeseeable damage multiplied by three" which were the basis of the Department's expressed opposition to the original "general economy" provision (Hrgs., p. 94).

Also, whereas original S. 1284, §4C(a) has been modified by limiting to the Sherman Act the scope of the antitrust violations for which "general economy" or "individual residents" treble damage recoveries are authorized, § 4C(a)(1), nonetheless the same conduct covered by §§ 2 and 7 of the Clayton Act could be pleaded also as violations of the Sherman Act.[8]

Above all, all violations of the sweeping generalities of the Sherman Act remain subject to Title IV's massive treble damage authorizations, on a retroactive basis. §405.

The problem of "unforeseeable damages" is dramatized by the constantly shifting and expanding interpretations of the Sherman Act's broad prohibitions.

Thus, commerical conduct which may have been long considered entirely law ful can become unlawful by reason of new expansive judicial interpretations. Prominent recent examples of such activities, challenged or adjudged as Sherman Act violations, include.

(*a*) Territorial restrictions on distributors' resale of manufacturers' products, *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967);

(*b*) Consignment price arangements between oil companies and service station retailers, *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964), 396 U.S. 13 (1969);

(c) Suggested fee schedules for professionals and services, including:

Attorneys, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *United States* v. *Oregon State Bar* (Civ. No. 74–362, complaint filed May 9, 1974, in U.S. Dist. Ct., Portland, Oregon; dismissed as moot, Oct. 20, 1975, after state bar withdrew fee schedule);

Travel agents, *United States* v. *Orange County Travel Agents*, 1975–2 Trade Cas. ¶ 60,440 (C.D. Cal.) (consent order settling charges against small association of travel agents).

Real estate brokers, *United States* v. *Real Estate Board of Rochester, New York, Cir.* No. 74–535 (complaint filed Nov. 19, 1974 in U.S. Distr. Ct., Rochester, N.Y., consent decree entered Dec. 23, 1974, effect of decree stayed pending appeal, Feb. 18, 1975).

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[7] These concerns were confirmed by Mr. Allen P. Stults, Chairman of the Board, American National Bank and Trust Co. of Chicago and Former President, The American Bankers Association. In pertinent part, Mr. Stults, on Feb. 12, 1976 wrote this Committee: "I wish to stress the importance for the national economy of a careful assessment as to how potentially huge contingent liabilities, particularly of smaller firms named as co-conspirators in such antitrust actions, may affect their access to financing and capital markets. * * * In view of SEC disclosure requirements in the financial statements of public corporations which incur material contingent liabilities in pending antitrust litigation, it is my considered opinion that such antitrust actions may have a substantial adverse impact on the financing opportunities particularly of smaller firms named in such actions. This is so because banks and other financial institutions will necessarily take such substantial contingent liabilities into account in their lending decisions."

[8] *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *United States* v. *First National Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964).

Beyond this, anti-solicitation and anti-advertising restrictions by professional association, such as the AMA's "Principles of Medical Ethics" and comparable restrictions by the opticians, pharmacists, veterinarians, and anesthesiologists, are under current challenge as violations of the antitrust laws.[9] All of these groups could become subject to huge liabilities in suits under Title IV.

In my view, therefore, Title IV of S. 1284 would fill no real vacuum in antitrust enforcement. Indeed, the "hard core" antitrust violations such as price fixing among competitors, which may be the typical source of the "overcharges" to be recaptured by Title IV, are already subject to criminal penalties of up to three years imprisonment as felonies under the recently stiffened penalty provisions of the Sherman Act.

The justification for Title IV cited by the Justice Department's support for Title IV's parens patriae concept, i.e., the problem of overpayments by multiple small consumers without redress from antitrust violators unjustly profiting from such illegalities, is already addressed by the existing class action authorizations under Federal Rule of Civil Procedure 23 in meritorious cases. Rule 23 permits individual claimants to sue and collect treble damages for any financial injuries caused by antitrust violations, subject to the specific provisions and safeguards of Rule 23 as to the manageability of such actions and their superiority over other forms of litigation.

In my view, any deficiencies in providing appropriate redress arising under Rule 23 are better achieved by an objective and detached assessment of Rule 23 by the Judiciary, including its "notice" requirements, in light of the courts' actual experience over the last decade in class antitrust litigation. Whatever the controversy as to the merits of Title IV, the means and procedures of achieving its objectives through the judicial system requires thoughtful and careful consideration.

Hopefully, such advice and enlightenment by the Judiciary will be available to the Committee in its consideration of Title IV.

Indeed, I am unaware that the Department of Justice, or any other agency of the United States, has to date expressed its position or views as to Title IV of S. 1284 in light of the far-reaching revisions in the Committee Print of July 28.

While the Department has expressed support for the parens patriae concept embodied in H.R. 8532, as reported by the House Committee on the Judiciary on September 22, 1975, H.R. 8532 differs substantially from S. 1284, Title IV as revised by the Committee Print. The July 28, 1975 Committee Print also differs substantially from Original Title IV of S. 1284, and differs substantially from H.R. 8532. Among other things, the Committee Print reflects a deletion of the "parens patriae" limiting language in Section 4C(a), and the Committee Print apparently authorizes contingency fee arrangements, as previously discussed.

Question 4. What would the big picture impact be on small business should S. 1284 become law?

Answer. Particularly in view of the July 28 Committee Print's revisions, I would view Title IV's prospective impact on smaller business firms as negative.

Original S. 1284's provisions authorized "parens patriae" suits by a State Attorney General on behalf of injured "persons" residing in the State, which under established interpretations would have included "injured" corporations or partnerships within the "person" concept. However, Section 4C(a)(1)(A) of the Committee Print has changed this definition so as to limit such suits on behalf of "natural persons" residing in the State. Accordingly, any financial recovery which a smaller firm might have derived from the original Title IV authorization in S. 1284 has now been deleted by the Committee Print's limitation to "natural persons."

More important, my February 3 prepared statement and the preceding discussion highlight the special and negative impact of Title IV, as revised, on the smaller firm. For it is particularly such smaller firms, lacking the litigation expertise and financial resources which the largest companies can mobilize for the

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[9] See FTC releases, Jan. 26, 1976; Dec. 28, 1975; *United States* v. *American Pharmaceutical Ass'n.*, Civil No. G–75–558–CA5 (filed Nov. 24, 1975, in Grand Rapids, Mich.); *United States* v. *San Diego County Veterinary Medical Ass'n.* Civ. 75–1078–N (filed Nov. 14, 1975, in San Diego, Calif.); *United States* v. *The American Society of Anesthesiologists, Inc.*, Civ. No. 75–4640 (complaint filed Sept. 22, 1975, in U.S. Dist. Ct., New York City).

successful defense of an antitrust action, which may be specially victimized—as exemplified by the individual real estate brokers in *Kline*, or the smaller hotels and motels in *In re Telephone Charges*.

Indeed, with the recent emphasis by the Department of Justice and the Federal Trade Commission on antitrust enforcement in the area of personal services, rather than product sales, as shown by proceedings against doctors, veterinarians, opticians, pharmacists (noted above), auto repair shops (*United States* v. *Northwest Collision Consultants*, Crim. CR 75–375–V, Civ. C–75–837, filed Dec. 3, 1975, in Seattle, Washington), and perhaps others to come, the exposure of such typically smaller business organizations to punitive damage claims by Title IV litigation, by a State Attorney General with or without private auxiliaries, may become even more conspicuous in the future.

I appreciate the opportunity of responding to your questions, and would respectfully request the inclusion of this letter in the record.

Very truly yours,

FREDERICK M. ROWE.

Senator HRUSKA. Thank you for being here.

Did you identify the gentleman who is accompanying you?

Mr. STEWART. My apologies to Mr. John Lewis, our executive vice president.

Senator HRUSKA. Have you any comment?

Mr. LEWIS. No, thank you, sir.

Senator HRUSKA. Thank you both for coming.

Senator Mathias, have you any questions or observations?

Senator MATHIAS. No. I join the Chair in my thanks to both of the witnesses. It is very interesting. I am very interested in your analysis of what you see as to what may come in the next 2 years.

Mr. STEWART. If I could be permitted one last comment, Mr. Chairman. In my statement I urge this committee to consider seriously going beyond S. 1284 in looking at the merger problem and joining with the Banking and Currency Committee and the Committee on Finance, because this is an interlocking problem. And when you talk about mergers, I urge you, finally, look at the *Microdot* case. It is not a failing company; $300 million, great success—had to merge itself to defend itself. I think that title V, perhaps, would be a little help in that kind of situation.

Thank you again.

Senator HRUSKA. Thank you very much.

The subcommittee will stand in recess until 9:30 a.m., tomorrow in this same room.

[Whereupon, at 12:37 p.m., the proceedings were recessed, to be reconvened at 9:30 a.m., March 3, 1976.]

THE ANTITRUST IMPROVEMENTS ACT OF 1975

WEDNESDAY, MARCH 3, 1976

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:30 a.m., in room 2228, Dirksen Senate Office Building, Hon. Roman L. Hruska presiding.

Present: Senators Burdick, Hruska, and Thurmond.

Staff present: Howard E. O'Leary, chief counsel and staff director; Bernard Nash, assistant counsel; Patricia Y. Bario, professional staff member; Catherine M. McCarthy, chief clerk; Peter N. Chumbris, minority chief counsel; Emory Sneeden, assistant counsel.

Senator HRUSKA. In the absence of the chairman, on account of other official duties, I have been asked to preside.

This will be a continuation of the hearings on S. 1284.

Our first witness this morning is our colleague from the House, Congressman Charles Wiggins of California, a member of the House Judiciary Committee.

Congressman Wiggins, you are recognized and may proceed with such testimony as you wish to give.

STATEMENT OF CHARLES E. WIGGINS, A U.S. REPRESENTATIVE FROM THE STATE OF CALIFORNIA, MEMBER OF THE HOUSE JUDICIARY COMMITTEE

Congressman WIGGINS. Thank you, Mr. Chairman, Senator Burdick, Senator Thurmond, members of the staff.

My remarks this morning will be directed only to one title of S. 1284, namely your title IV, which is characterized as parens patriae amendments. I shall have no observations with respect to any other title of the bill.

I regret, Mr. Chairman, that I do not have a prepared statement to offer to the subcommittee. And, indeed, I have very few notes, but I have some strong feelings about this legislation, both conceptually and with respect to certain details of drafting in the bill.

First, I want to talk to the conceptual problem of creating a parens patriae remedy and raise the most fundamental question of all, which is whether the creation of such a remedy is in the public interest. I suspect, Mr. Chairman, that this subcommittee has heard extensive testimony from others on this policy question, and it is not my purpose to duplicate that testimony, but simply to augment it with my own views.

Mr. Chairman, I am prepared to commence a consideration of that issue by acknowledging that there is a deficiency in the current Clayton Act enforcement provisions in that small claims suffered by individual consumers are largely not compensated now because of the economics of the recovery process. To the extent that a consumer can prove a damage to his business or property, under current Clayton Act provisions, the loss, in many cases, is so small that there is no economic incentive for the consumer to maintain an action which would otherwise be permissible under the Clayton Act. And, accordingly, it is said that the consumers are being ripped off and that they are without a remedy unless we change the law.

I am prepared to concede that it is possible that some consumers are suffering damages, and, at the present time, they are not being compensated. But to state the problem, is not necessarily to suggest this solution. In my opinion, the proper and legitimate interest of the Government and the consumer, given this state of affairs, is, first, to stop it; stop the conduct which is causing the injury.

I represent, to the members of the distinguished subcommittee, that the law now permits injunctive action to enjoin the conduct which is causing a harm to the consumer. And so no change is necessary to authorize the State, acting as parens patriae on behalf of a large class of its citizens, to enjoin violations of the Sherman Act. The subcommittee may wish to consider the wisdom of providing for attorneys' fees in such injunctive cases, but the remedy exists to stop it. You need not amend the law, therefore, to accomplish that one object which is clearly in the public interest.

What else serves the public interest? What other interests are served and required by a consumer? It is said that they are entitled to be compensated for these miniscule losses. Well, I find it difficult to argue that the person who suffers the loss should not be compensated for the loss which he has sustained. But the mechanism in this bill, by adopting a compensatory theory, creates such additional strain on the judicial system, and potentially on the economy as a whole, that I would think that a fair balancing of the interest of a consumer, who may or may not have suffered some miniscule loss, putting that interest on one side of the equation and putting on the other the kind of club which is to be given to State attorneys general, under this bill, a club which, if exercised aggressively, can destroy an entire industry and all the consumers who work for that industry and all the consuming public who may invest in that industry; if you put that on the other side of the equation, then I think that the public interest would be served by taking a step back from this remedy and selecting an alternative way to serve the public interest. And I suggest to you, gentlemen, that there is such an alternative.

We should abandon conceptually the notion of compensatory recovery. We are going to tie up the courts interminably in just trying to prove that dollar loss. Abandon that, and move instead to a system of civil fines; that is, convert the remedy to a fine mechanism adequate to deter those who violate the antitrust laws. Now, as you know, the recent amendments to the Sherman Act have raised the potential for fines in criminal cases to a million dollars. Well, I am suggesting that that may not be enough in some cases to deter future violations, where

there is a profit in continuing that violation. I do think that it is possible, if you gentlemen are willing to rethink this issue, to develop a civil fine mechanism where the potential of civil fines to be levied against a manufacturer, for example, who violates the antitrust laws, can be up to $25 million, $50 million. The amount of any fine should, of course, be tempered by justice and commonsense and some consideration of the impact of such a fine on the economy, on the industry, and on the offending defendant.

This bill does not do that, of course. If the fluid recovery mechanism now in the bill is permitted to work, every manufacturer in this country engaged in commerce is looking at, at least, the threat of a club in the hands of a politically elected leader—an official who can drive that business completely out of business. These cases, if this mechanism is permitted to exist in the law, are going to be settled, Mr. Chairman. They are not going to be tried because a defendant simply could not risk a trial.

Under the bill now pending before the Senate, there is no limitation with respect to contingent fee arrangements. There is, in this country, an honorable and distinguished group of practicing attorneys known as the Plaintiff's Antitrust Bar. They are engaged in trying treble damage suits. And it is a lucrative business. They are deterred somewhat from proceeding on behalf of large classes by present interpretations of rule 23; that is, limiting the size and manageability of classes. And I believe that the Plaintiff's Bar, if this bill is passed, might well seek out States and seek to represent the States, commissioned as an attorney general for purposes of the suit, in class actions on a contingency basis. These actions would be settled because they would have to be settled. The only certain beneficiary of such actions would be the plaintiff's attorney.

Now, I would like to go through several sections of the bill pending before you, Mr. Chairman, hoping, first, that you would question the wisdom of even enacting it in this form. But if you are inclined to proceed with the bill in its present form. I would like to make some observations that I think would be useful to the committee.

Section 4(b) adopts the discarded theory that damages can be measured by a loss to the general economy of a State. I believe that no Senator should vote for that section without reading the *Hawaii* case—that is, the *Hawaii-Standard Oil* case—in which this issue was carefully discussed and rejected by one of the distinguished courts in this country. It is an unworkable mechanism. The meaning of the general economy, even as defined in terms of decreases in revenues or increases in expenditures, is still a vague concept which is unworkable in the management of a lawsuit. It merely permits speculative damages and ought to be rejected. On the House side, this section of your bill, 4(a)(1)(b), was deleted, and I would urge that this subcommittee consider deleting that section as well. Again, let me emphasize that the ninth circuit has considered this question carefully, in my opinion, in the *Hawaii* case, and I commend it to you for your reading.

The next problem that I have with the bill is in section 4(b), the notice provision. This appears to be an intentional modification of rule 23. Rule 23 of the Federal Civil Rules, as you know, has to do with class actions. Notice requirements of rule 23 are described in the rule

as the best practicable notice. This legislation rejects that standard and says that notice by publication is permissible, but if the court should find that such notice would be mainfestly unjust, then it may direct some additional notice. The rule 23 provisions, Mr. Chairman, are bottomed on due process consideration. Several courts have construed rule 23 and the requirement of personal notice in a given case as a mandate of the Constitution, not subject to legislative modification. In this respect, I commend to the subcommittee the *Eisen* case, and it ought to be read by every Senator before you vote on this language because it would appear that you are reversing *Eisen* and rejecting all of the reasons, and carefully considered reasons, which prompted the court to decide that case as it did.

Section (c) is perhaps the most controversial. It embraces the concept of fluid recovery; that is, permitting damages to be proved and assessed in the aggregate on the basis of statistical or sampling methods or such other reasonable methods of estimation as the court in its discretion may permit. Once again, Mr. Chairman, I think that this section is subject to at least question on constitutional grounds. If the *Hanover Shoe* case, written, as I remember, by Justice White, means what I think it says, it would cast serious doubt on the constitutionality of this section. That is to say, you cannot, consistent with the Constitution, take the property of one person and give it to another unless it can be established that the damages are caused by the conduct of the person who must surrender his property.

Now, it might be alleged here that this language still requires proof of some damage to individual members of the class. As presently drafted, however, this does not address the very complicated passthrough problem. What I am talking about, gentlemen, when I say the passthrough problem, is the consumer who claims the damage is at the end of a distribution chain. If the antitrust violation occurs at the top of that chain by the manufacturer, it is almost impossible to ascertain whether the damage occasioned by that antitrust violation trickled through the chain and was passed on each succeeding stage to be borne by the person who is going to get compensated for it; namely, the ultimate consumer. Again, the language in *Hanover Shoe* is most enlightening in terms of the difficulty and, in the view of the Judge in that case, the impossibility of making these kinds of conclusions.

If, however, you permit recovery at the bottom of the chain, notwithstanding these difficulties, you might very well be taking property from one person and giving it to another without any real casual relationship between the misconduct and the reward of damage. This is a very complicated section, the statistical sampling method, which has been rejected, as you all know, heretofore, by some of our courts of appeal. And it is being asked now to be adopted by you in the bill.

Senator BURDICK. Congressman Wiggins, was it not rejected on constitutional grounds?

Congressman WIGGINS. I think, Senator Burdick, I would have to say that it had constitutional overtones. I am reluctant to say that the court held that it was unconstitutional. The courts have attacked this problem in many ways. They have attacked it at the rule 23 phase. That is, they have simply not certified the class because of all of the

unmanageability problems. They have attacked it on a standing basis; that is, the State has no standing to sue on behalf of consumers because there is no damage to their business or property; various issues.

But I think *Hanover Shoe* is the one case which directs its attention especially to this passthrough problem, and I simply commend it to your reading. It was decided by the Supreme Court, and I think on a constitutional basis.

Senator HRUSKA. Will the witness yield?

Congressman WIGGINS. Of course.

Senator HRUSKA. The American Bar Association witnesses who testified yesterday put that point in these words, Congressman, with reference to constitutionality. I am quoting:

> As this committee knows, Federal court jurisdiction is limited under Article III of the Constitution to a "case of controversy" involving parties who must show injury in order to have standing to bring a suit, and is subject to the requirements of procedural due process.
>
> Any provision that authorizes a court to calculate damages against a defendant without hearing in regard to proof of any actual injury to identified plaintiffs must almost invariably run afoul of these two principles.

Congressman WIGGINS. Yes, and particularly the latter.

Senator HRUSKA. Is that not the essence of the point?

Congressman WIGGINS. Yes, indeed, it is, Mr. Chairman.

Senator HRUSKA. And is it not further true that if there is no determination of damage, no evidence, no burden of proof sustained, and a judgment is levied, it is in the nature of a penalty, rather than a recovery of damages, is it not?

Congressman WIGGINS. I think it is.

Senator HRUSKA. And is it wise to put into the hands of private litigants the power to, in the court, levy a fine which is not expressly authorized?

Congressman WIGGINS. Well, the question literally shouts out the answer. Of course, it is not. And that is one of my conceptual problems with the bill. The problem is focused in this fluid damage recovery section which brings it all together and raises these very profound policy and legal questions.

I hope that the committee decides to rethink this bill and simply convert it to a fine mechanism enforceable by U.S. attorneys. I do not see any reason to yield to the 50 State attorneys in order to impose a fine suffered by the greatest parens patriae of them all, that is the United States sovereign.

If the Congress abandons this compensatory theory and addresses the problem in terms of stopping the misconduct and punishing the offender in a degree adequate to see that it is not repeated and that others learn a lesson, then we will have moved forward in enforcing the antitrust laws without getting trapped into the difficult constitutional questions.

Senator HRUSKA. Congressman, if you will yield, Senator Thurmond has other commitments in the Armed Services Committee this morning. Will you indulge him in a few questions at this point?

Congressman WIGGINS. Of course I will.

Senator THURMOND. Thank you very much, Mr. Chairman.

Congressman Wiggins, we are delighted to have you here, and we appreciate your testifying because of the fine knowledge that you have

on this matter. Someone expressed to me that you probably knew more about this bill or certain facets of it than anyone in the Congress.

At any rate, we are very pleased to have you here.

Now, I have some questions here, but I have to get to three committees this morning. The next is Armed Services, at which I am compelled to be at executive session.

I will ask that you respond in writing to these questions. You may answer them for the record, at your convenience.

Congressman WIGGINS. I will be pleased to do so.[1]

Senator THURMOND. Thank you very much.

Congressman WIGGINS. On page 59 of the bill, Mr. Chairman——

Senator HRUSKA. Now, what bill are you reading?

Congressman WIGGINS. Your bill, sir.

Senator HRUSKA. The original? You see, there was one prior, introduced on March 21. There was a committee print based upon that introduced bill but revised as of the date of July 28. The front page would indicate which of those is in effect on the copy you have.

Congressman WIGGINS. Yes. I am referring to the committee print.

Senator HRUSKA. That is dated July 28, 1975?

Congressman WIGGINS. Yes, sir.

Senator HRUSKA. Thank you.

Congressman WIGGINS. On page 59, there is a trebling section, section (c) on line 7 and following, which permits trebling of monetary damages in those cases where Federal funds have been involved in the activity, giving rise to antitrust violation. I think I am referring to the right section. If not, I will just state what the problem is, Mr. Chairman.

The bill permits trebling even though the State may have only a minor monetary interest in the activity. If you take a 90:10 highway program, for example, with 90 percent Federal money, 10 percent State money, as you know, under the current act, the Federal Government may not recover treble damages. But if you trebled the total amount, the multiplication in terms of how much the State's interest has been increased far exceeds three times, since it only has a 10-percent interest in the illustration which I gave. I would suggest to the committee and to the staff to rework the language to prevent that unnecessary and, I believe, unjust recovery.

I want to suggest that there is no policy reason, of which I am aware, to permit treble damage recoveries at all in these cases. Treble damages are authorized under the Clayton Act, as the committee knows, for several policy reasons. One is to encourage private parties to enforce our antitrust laws, to provide an incentive for them to sue. Well, I want to suggest to you that there is very little reason to think that the State attorneys general around this country are going to require that kind of economic inducement to sue.

The second policy reason is a penalty to deter others from engaging in acts which are condemned by the Sherman Act. I would think that, given the size of the class here, the potential for large awards even confined to single damages are so great that it would be a massive deterrent without imposing the treble damage penalty on top of it.

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[1] See p. 169.

Now, finally, Mr. Chairman—and then I shall conclude—I want to speak to the question of contingent fees, briefly. The House adopted an amendment to the bill which prohibits State attorneys general from entering into a contingent fee arrangement with private counsel representing the State in these matters. I think that such an amendment serves the public interest, Mr. Chairman. The reality here is that the attorneys have the largest single economic stake in the recovery. It could be that we are talking about, for example, $100 million as a potential provable sum of damages.

Individual consumers may have a miniscule interest in it, so miniscule that they may never be aware of their loss. But the real interest is in an attorney who is going to get some percentage of that $100 million. I do not care what the percentage is, it is clearly the largest sum to be paid out of the award. The promise of large fees provides an improper incentive for private counsel to seek out States, so as to be permitted to maintain actions on their behalf. It permits the opportunity for abuse by encouraging improper relationships between private counsel and State attorneys general. I think that the public interest will be served by discouraging that potential for abuse, by denying contingency relationships.

Now, if such an amendment is adopted, it does not mean that the State must depend upon their State attorney who may have no antitrust experience to maintain these actions. The State is then in the very same position that the defendant is in. The State may go out and hire the best antitrust counsel in the country, but the State is going to pay that counsel on a per diem or per hour basis just the same way the defendant is paying its counsel. It provides absolute parity between defendant and plaintiff. It avoids the abuses which I think are so obvious as to not to require elaboration. And it does not eliminate the availability of professional counsel to serve States. It only deals with the financial arrangements between professional counsel and the State.

And I think you would have to say that most States of the Union are as able as most corporate entities to hire competent counsel on the same basis as the corporate entity. I would urge the subcommittee, Mr. Chairman, to consider such an amendment as we have in the House.

I thank the committee for the privilege of testifying this morning before you.

Senator HRUSKA. Well, thank you for your testimony this morning.

What were the extent of the hearings in your committee on this title IV which you processed?

Congressman WIGGINS. Mr. Chairman, I confess, I am not a member of the subcommittee which considered this bill in the House. I am a member, of course, of the full committee, and I have great interest in it. But I was not personally present during the hearing phase in the House, and I cannot speak from personal knowledge. I believe that the House held extensive hearings, however, in the subcommittee.

Senator HRUSKA. Could you supply the pages, the printed pages of the testimony?

That bill, upon being reported by the subcommittee to the committee, was recommitted, was it not, last year to the subcommittee for further consideration?

Congressman WIGGINS. Yes, sir. It had a strange history. It was reported out of the subcommittee. The subcommittee chairman, after consultation with the majority, voluntarily withdrew the bill and made certain changes in it, which tempered the bill, frankly. Then, it was reported to the full committee. Amendments were adopted by the full committee which further tempered the bill and, I believe, improved the bill somewhat. It was reported then to the Rules Committee.

Following a full hearing before the Rules Committee, the Rules Committee in the House refused to grant a rule and laid the bill on the table. I think the precise action was to postpone further consideration of the bill, something to that effect. Chairman Rodino was obviously disappointed by that action in the Rules Committee and, frankly, lobbied very hard amongst his colleagues to have the Rules Committee reconsider it. Several weeks ago, the Rules Committee did reconsider it and reported the bill out. It will be on the floor probably next week.

Senator HRUSKA. Did the committee consider any of the other seven titles which are contained in this Senate bill?

Congressman WIGGINS. No, sir. The committee is considering them, but as separate bills. They did not consider them as a package such as the Senate has done.

Senator HRUSKA. Are any of them in the process of being considered as independent bills? You need not detail on the subject. They are pursuing them, though?

Congressman WIGGINS. Oh, yes, sir. Yes.

Senator HRUSKA. Do you know at what stage that pursuit is?

Congressman WIGGINS. Well, since we are talking about separate bills, really, with respect to these various titles, I will be pleased to furnish you that information, Senator.[1]

Senator HRUSKA. Yes; if you will, just to give us an idea of the facet in which you are pursuing the matter.

Senator Burdick, have you any questions of our colleague?

Senator BURDICK. Well, your recommendation would not preclude the use of the class action if damages could be proven in addition to the civil fine?

Congressman WIGGINS. No, sir. I think I would leave the law where it is. Class actions are permitted under the law, and they are permitted now for antitrust violations if the aggrieved parties are able to prove a damage to their business and property. And the class actions are required to be manageable under existing rule 23. Rule 23 serves a very valuable purpose, as it has been construed, Mr. Chairman. And I think if you pass this bill out, your report ought to speak to the impact on rule 23 because it leaves it in a very unclear posture.

In summary, sir, I would leave the class action situation exactly where it is now.

Senator BURDICK. When you speak of a civil fine, does the amount of that fine have any relation to the alleged unjust enrichment that the company might have?

Congressman WIGGINS. Yes, sir, I think it should. I think the schedule of potential fines should be quite large so that, in assessing that fine, such factors as the degree of unjust enrichment, the nature of the wrong, can all be considered.

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[1] See p. 169

There are some problems in the civil fine mechanism which, in all fairness, I should raise. The res judicata problem is a little difficult. I take it that a civil fine would not be res judicata with respect to settling the right of the individuals to bring compensatory damage actions, and the potential for a duplicate penalty is ever present. But I think that is more illusory than real because, as we know, these individual claimants suffering very small losses are not bringing their civil actions to recover damages. I would think it is a risk worth running, even though a fine would not have the bar effect that this bill would have.

Senator BURDICK. Thank you very much.

Senator HRUSKA. Before I refer this for questions of staff here, it has been suggested that there is a middle ground in this title IV. There is a tremendous pressure or indication of interest in having State attorneys for the individual States to have the capacity to sue under the antitrust law. That standing in the court was denied in the *Hawaii* case, was it not?

Congressman WIGGINS. Yes, sir. Well, *Frito Lay* is probably the case, but one or both of those cases did reach that conclusion.

Senator HRUSKA. Now, there has been a proposal that there be a simple and straightforward bill which would provide for representative actions of this type by State attorneys general, but that they have the jurisdiction and that they have the rule 23, which was fashioned after a lot of deliberation and much experience in the Federal court system to govern those actions, but not to give them powers that even the Attorney General does not have now and a lot of other things, the general economy recovery and the contingent fees and all these other things.

That suggestion was made because it was felt that the bill which we have before us does not have the idea of overruling and the disqualification of the State attorneys general, but that it also has incorporated into it the abolition of overriding of rule 23 of all of its protective measures. What would you think of that kind of an approach?

Congressman WIGGINS. Well, I want to agree, first, with the Senator that this bill would not be before us if plaintiffs' counsel had not been frustrated by, in some cases, rule 23, in some cases by the rejection of the loss to the general economy theory, and in some cases by the lack of standing, depending upon the rationale adopted by the various courts in our circuits. It is because of frustration with case law that this bill comes to Congress to create a remedy that the counsel representing clients, of course, have not been able to sell to the courts.

Well, now, Mr. Chairman, I am not yet convinced that a public interest is served by simply conferring upon State attorneys general a right to enforce our Federal antitrust laws. I presume that that would be constitutional. I suppose that *Buckley* v. *Valeo* would have some impact upon that question, but I am not prepared to decide that. But the notion of yielding to some nonexecutive official the right to enforce Federal statutes is now, at least, uncertain in light of *Buckley* v. *Valeo*.

But why? Why do that? We have before us now a bill to beef up the Antitrust Section of the Department of Justice, treble the authorization, as I recall. If it works, we should have a sufficient Federal infrastructure around this country to prosecute Federal antitrust violations. Now, do we really need the States and their attorneys general to help

us in this? If the answer to that is "Yes," then understand that it will be difficult to manage a coherent national antitrust policy because we will have 50 attorneys general proceeding as they saw fit. I really question whether we need State enforcement support.

If there is a wrong here, the wrong is to consumers who have these small actions. And I would suggest that the remedy for that wrong is to see that it does not happen again and punish the offender, and not get tied up in this compensatory mechanism which is the heart of the parens patriae bill.

Senator HRUSKA. Thank you, Congressman Wiggins.

Mr. O'Leary, do you have any questions?

Mr. O'LEARY. No; thank you, Mr. Chairman.

Senator HRUSKA. Mr. Nash?

Mr. NASH. Thank you, Mr. Chairman. Congressman Wiggins, the essence of what I understand your concern to be is, first, grave constitutional questions pertaining to title IV, and second, the specter of ruinous liability. Is that essentially correct?

Congressman WIGGINS. Yes; and I would add a third, that even if it is constitutional, it may not be good policy.

Mr. NASH. Do you recall whether these issues were raised and debated in the House Judiciary Committee which reported H.R. 8532, which is the companion bill to title IV of S. 1284?

Congressman WIGGINS. Yes, sir, they were debated in my presence in the full committee, and I, of course, did not participate in the debate in the subcommittee. And, as a result of that debate, modifications were made in the bill which are constructive, but not sufficient to save the bill from constitutional attack if indeed this whole fluid recovery notion is unconstitutional.

Mr. NASH. Is it correct that out of the approximately 40 members of the House Judiciary Committee 6 joined and concurred with your views and the balance voted to report the bill?

Congressman WIGGINS. I do not believe that is so. My views were tied up in specific amendments. For example, one of the amendments which I regard to be quite important offered by me in the full committee, was to provide a reduction-of-damage mechanism. That is, simply stated, that if you compute the massive, ruinous damages, the court, in the interest of justice, ought to have some power to reduce them, giving consideration to certain factors which were stated in the amendment. That amendment was defeated very narrowly; something like 16 to 18, or thereabout. After we disposed of these very contentious issues and the question was to report the bill, yes, an overwhelming majority of the members voted to report the bill.

Mr. NASH. Congressman, if rule 23 were permitted to govern the course of class action brought by State attorneys general as parens patriae, which is one proposal under consideration, how feasible would it be for the State attorneys general to represent 500,000 or 600,000 consumers who may have been overcharged for milk or bread purchases, and to bring each of those half a million or so consumers before the court to prove, on an individual basis, the fact of the injury and the amount of the damage?

Congressman WIGGINS. How feasible would it be?

Mr. NASH. Yes.

Congresman WIGGINS. It would not be feasible at all, but due process is not a matter of economics, nor a matter which always lends itself to efficient administration of a lawsuit.

If careful analysis required that a person not give up his property, absent proof that another is entitled to it, it may be inconvenient, but it may be required nevertheless, and it may require this committee to take a look at the mechanism and realize that it is so inconvenient that it must be abandoned in favor of some other mechanism.

Now, I am not prepared personally, to conclude that the due process clause prohibits some sort of sampling, but I will tell you that if you have a class of, let us say, half a million, it is not going to be sufficient to bring in three or four members of that class and say that this is a demonstrably reliable sample of a half a million. The number of individual plaintiffs suffering a probable loss is going to have to be very large in order to have a statistically reliable sample when we are talking about a class of a half million, in my opinion. Given the difficulty of proof for each member of the sample, because of these passthrough problems, we are placing the Federal judiciary under a terrible strain. It is going to take a long time to try these cases, and I ask you for whose benefit? Why submit the system to that strain? Clearly not for the consumer. He really has very little interest in it. It is largely for counsel and for the ego of the State attorney general and, perhaps, for the general revenue of the State.

Mr. NASH. I have no further questions, Mr. Chairman.

Senator HRUSKA. Any further questions, Senator?

Senator BURDICK. That last exchange led me to another question. Do you see any problems having 50 lawsuits going simultaneously in a particular area?

Congressman WIGGINS. Well, on the same issue, yes indeed. Of course, joinder is permitted. Joinder could cause the class gross mind-boggling proportions.

There conceivably could be 50 million in the class, and the problems of proof would be beyond manageability. Why would the Congress wish to heap that burden on the Federal courts when there is such marginal benefit to be gained from it?

Senator BURDICK. If the issue is the same in each one of the 50 cases, it probably should be consolidated.

Congressman WIGGINS. That is the logic of it but——

Senator BURDICK. Then if you go a step farther, why don't you have one lawsuit in the first place?

Congressman WIGGINS. We have a man already down here on Pennsylvania Avenue called the Attorney General who has the power to bring a lawsuit, not for monetary recovery to the class, but he has the power to deter conduct. He has the power in appropriate cases to bring criminal action where fines are rather substantial.

The benefits, Senator Burdick, from this legislation are really illusory. The burdens are very real.

Senator BURDICK. I wish somebody would point out to me here this morning what the advantage of bringing these separate suits is.

Congressman WIGGINS. Well, I think the individual State attorneys general might see some advantage for them in getting on a white

horse and leading the charge in their State against an oil company, for example, and if one succeeds, it will spread like wildfire, in my opinion, around the country as each attorney general jumps on that bandwagon and attempts to extract a settlement for the benefit of the consumer. So I think that the lawsuit will proliferate around the country. The administration of justice, at least within the circuits, ought to require a consolidation, but the consequence of consolidation may be to expand the class beyond all manageability.

California has 21 million consumers. If we were to throw in Montana, Idaho, and several other States, it is possible that the class could easily exceed 30 million, 40 million. If individuals suffer a $100 loss each—what are we up to now, $2 or $3 billion—then we treble that, we are up to $6 billion. The plaintiffs are represented by an organ of government which may, indeed, regulate the defendant. Settlements are certain. General Motors could not withstand such pressure.

Senator BURDICK. Apart from the white horse theory, I do not understand why we should have so many lawsuits pending that could be determined in one lawsuit.

Congressman WIGGINS. Why we should? Well, I am not aware of any bar other than consolidation. The parties are different. There is a common defendant, of course, but there are different plaintiffs in each case, and unless there was some compulsory joinder of these actions, they would, under ordinary circumstances, have the right to maintain independent and separate lawsuits. Now, wisdom would dictate that they be consolidated, given common questions of law and fact.

Senator BURDICK. Either that, or a case tried in one State could possibly determine the fate of others.

Congressman WIGGINS. On the liability issue. Well, I would think in many cases, the liability issue is not going to take to much time. It is the damage issue that is going to take the time. And after the case is over, Senator, the court is going to have spent an awful lot of time on attorneys fees in these cases. The court has to approve the fees, and when you are talking about a case that has lasted for years, the resolution of the attorney fee issue is a further burden on the court. It is now, and I am just saying it is going to be multiplied by these actions.

Well, I appreciate, gentlemen, the opportunity to be here, and I am certain you will do the right thing, and if not, I will see you in conference.

Senator HRUSKA. Some years ago, Congressman, we had hearings on this subject alone, the class action, which made sense, because then we could concentrate on that issue and really discuss it in depth and so on. Nothing came of it because of difficulties, some of which you have outlined today. There was in process at that time the trial and the experience under two significant items—one was a statute and one was a rule. The statute was the multidistrict jurisdictional joinder of action, and the rule was rule 23, and frankly, the committee just resolved the matter by saying, "Let us permit those factors to work and see how they do."

However, during the course of the hearing, our attention was called to the so-called *Tetracycline* case. It is a prescription drug. That case

was instituted in 1963. Some of the defendants separately reached a settlement and paid money in the court. The case was continued as to other defendants, most of whom were dismissed, and the judgment was in favor of the defendants. It was not until 1972 that money started to be distributed among some of the claimants, and some of the money could be still on hand in 1976 awaiting disposition.

Only one's imagination can indicate how much time was taken of court machinery, judicial officials, the clerks, the judge, and all of that. Can you envision, under a fragmented procedure, multiplied 50 times, adding to the terrible burden on the court system?

Congressman WIGGINS. Yes, I most certainly can sir. I want to make a final point in response to the Senator's comment.

First, to agree. Yes, sir, it will strain the system terribly. But out in California, there is— I am sure as the subcommittee knows—the litigation against brokers with respect to the fixing of commissions in the sale of real estate, which has recently been determined to be an illegal price-fixing mechanism. It is a multimillion dollar action commenced against a large class of small businessmen brokers. I think the prayer in that case was something on the order of $750 million, and obviously, there is no defendant in that class that can do much about that, hardly even defend the action; it is just beyond belief.

The judge, in treating with the class, apparently, as I recall the opinion, interjected some new factors in rule 23, which are interesting. As I remember Judge Dunaway's opinion out there, he cranked in some just fundamental fairness factors in terms of whether to certify the class; that is, the whole action was so offensive to him that it was a shock to the conscience or the due process standard. As I remember, he nipped the action in the bud. I may be incorrect at that, but there was some order by the judge, at an early stage, simply because it was an unconscionable lawsuit. Well, we are dealing with the same kind of unconscionability here, with parens patriae.

Senator HRUSKA. Was that in Federal court?

Congressman WIGGINS. Yes, sir; it is in the ninth circuit.

Senator HRUSKA. Can you furnish the exact citation?

Congressman WIGGINS. Oh, sure, I will be happy to get you the case. Yes, sir.[1]

Well, thank you, gentlemen, for the privilege of being here.

Senator HRUSKA. Thank you. We are grateful for your appearance here in bringing the experience, not only your personal experience, but that of your committee, to this committee.

Senator HRUSKA. Our next witness is Mr. Philip Lacovara of Washington, D.C.

Mr. Lacovara, it is noted that you are accompanied by a gentleman whom we would like to have introduced and identified.

STATEMENT OF PHILIP A. LACOVARA, PARTNER, HUGHES HUBBARD & REED, ACCOMPANIED BY FRANK SPROLE, GENERAL COUNSEL, BRISTOL-MYERS CO.

Mr. LACOVARA. Thank you Mr. Chairman. With me this morning is Mr. Frank Sprole, who is the general counsel of the Bristol-Myers Co. I am appearing here this morning in my capacity as a member of the

[1] See p. 169.

firm of Hughes Hubbard & Reed, which is serving as counsel to Bristol-Myers in its antitrust litigation.

Before I begin my statement, with your leave, Mr. Chairman, I would like to advert to the *Tetracycline* litigation to which you just referred a moment ago. The Bristol-Myers Co. is so concerned about the legislation pending before the committee this morning, because it was one of the companies that was named in these first efforts to introduce the parens patriae damage concept into American law. It was one of the companies which was forced to settle for over $100 million for some of these damage claims, despite its insistence that it had not violated the antitrust laws. As the chairman said, the *Tetracycline* litigation began in the early 1960's. As recently as January of this year, the U.S. Court of Appeals for the Fourth Circuit affirmed the judgment of the trial court in North Carolina that, in fact, there had been no violation of the antitrust laws.

Senator HRUSKA. And what was that judgment?

Mr. LACOVARA. The district court, after a full trial on the merits in one of the cases which the States had refused to settle for part of this $100 million fund, had determined that the conduct of the defendants had not violated the antitrust laws. The fourth circuit, about 6 weeks ago, Mr. Chairman, affirmed that judgment and ruled that there was no antitrust violation.

Senator HRUSKA. How recently was this?

Mr. LACOVARA. That was January 1976. The citation to that case, Mr. Chairman, is *State of North Carolina* v. *Charles Pfizer Co.*, and it was decided on January 12, 1976.

Senator HRUSKA. Have you the book and page?

Mr. LACOVARA. It is not reported in the Federal Reporter yet. I have the slip opinion, Mr. Chairman. I can furnish a copy of it to the committee if the committee wishes to include it as part of the record.

Senator HRUSKA. I wish you would. It will be placed in the record.[1]

Mr. LACOVARA. Thank you, sir. This illustrates concretely one of the points that Congressman Wiggins made so eloquently. It underscores one of the essential objections to this whole concept, and that is: Apart from the merits of the issues that are being alleged by the plaintiffs, there is little opportunity for defendants to defend themselves in instances where claims are made that total hundreds of millions or, as in the *Tetracycline* litigation, billions of dollars.

As Mr. Wiggins said, a prudent businessman has very little choice but to make a huge settlement offer in the hope that even the small possibility that his belief in his innocence may be rejected by the court will not expose him and his company and his shareholders to potentially ruinous liability. That is why the courts have, rather consistently I think it is fair to say, in the intervening years, rejected the parens patriae concept, and why we submit that it would be unwise as a matter of policy, as Mr. Wiggins contended, and possibly unconstitutional as well, for this committee to reintroduce and to ratify what the courts have held is a device that exposes legitimate business activities to the threat of blackmail settlements.

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[1] See p. 578.

Senator HRUSKA. Mr. Lacovara, this committee is faced with some limitations on time. We will be required to adjourn by 11:30, so if you can skip-read suitably and give us the high-points, it would help us to achieve that adjournment goal. Then your entire statement will be printed in full for the record.

Mr. LACOVARA. Very well, Mr. Chairman. I have already adverted to the principal public policy objection to the legislation, and I wish to reecho what Congressman Wiggins said about these major objections.

The legislation proceeds on a rather dubious premise, and that is that some device is necessary to try and develop a consumer-compensation mechanism for small injuries which are allegedly being done to consumers, which are not being deterred or adequately compensated under existing law.

It is a hoax, Mr. Chairman, for this legislation to be purveyed as a device for compensating consumers. It is a hoax for two essential reasons, one of which, as Mr. Wiggins pointed out, is that it rather plainly, and I suspect and I believe unconstitutionally, attempts to dispense with the need to prove injury to consumers.

Several of the courts which have considered this question have specifically talked in constitutional terms. Mr. Wiggins mentioned the real estate brokerage case in the ninth circuit. I would also refer the committee to the *Eisen* case, in the U.S. Court of Appeals for the Second Circuit. "*Eisen III*" had language expressly stating that the fluid class recovery concept, which this bill would purport to codify into law, was rejected by the court because it was unconstitutional. The court said it was a flat violation of due process to try and assess what purports to be compensatory damages on the basis of liability to a general class of unnamed individuals without requiring the plaintiff to prove that those individuals were actually injured.

As Mr. Wiggins also said, the *Hanover Shoe* case rather directly points to the essential unfairness of this. In our law, Mr. Chairman, we are not preoccupied with notions of efficiency to the exclusion of basic questions of a fair, constitutional procedure.

When we are attempting to assess damages that one person should owe another person, we depend on proof that the alleged wrongdoer has not only done something wrong, but has actually injured the person who wishes to extract money from him.

Senator BURDICK. Is the *Eisen* case a circuit court decision?

Mr. LACOVARA. Yes, Mr. Chairman.

Senator BURDICK. Has it been appealed?

Mr. LACOVARA. *Eisen III* was affirmed by the U.S. Supreme Court in 1974. The court did not find it necessary to reach that question, because it held that the court of appeals had properly rejected this massive consumer class action on other grounds. The grounds were essentially those requiring specific individual notice to all members.

Mr. BURDICK. Could you read the circuit court's citation and the U.S. court's citation, both, sir?

Mr. LACOVARA. Yes, Senator Burdick, I can.

The Supreme Court's citation, *Eisen* v. *Carlisle & Jacquelin;* it is 417 U.S. 156 [1974], second circuit, same caption, 479 F. 2d 1005, and I do have the language of the court of appeals opinion before me, and

perhaps it would be useful just to read briefly what was said by the court. Circuit Judge Medina, who is, I believe, generally thought to be one of the finest judges in the country on questions of procedural law. He held the chair of procedural jurisprudence at Columbia Law School, or had held it for many years before going on the bench.

Judge Medina, in his opinion, rejected the notion that rule 23 could be understood as authorizing a fluid class recovery, which is what the bill before this committee would do in providing for aggregated damages without proof of either the fact or the amount of injury. He said:

> Even if amended rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process. But as it now reads, amended rule 23 contemplates and provides for no such procedure, nor can amended rule 23 be construed or interpreted in such fashion as to permit such procedure.
>
> We hold the fluid recovery concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.

Senator BURDICK. Has there been any other circuit court decision on this subject?

Mr. LACOVARA. There have been other circuit court decisions, Senator Burdick, rejecting the fluid class recovery concept. One is the *Kline* case, and two, the *Telephone* case. I can give the committee the citation to that case as well. That is *Kline* v. *Coldwell Banker and Co.*, 508 F. 2d 226. That is the brokerage case that Mr. Wiggins talked about.

The *Hotel Telephone Charges* case, also in the ninth circuit, 500 F. 2d 86, also rejects the device as being unauthorized. The court there commends the problem to the attention of Congress for resolution, but I think a fair reading of the opinion would indicate that the court had the same problems about the validity of this device that the second circuit had.

The Supreme Court, in *Hawaii* v. *Standard Oil* case, fairly read, casts very great doubt upon the constitutionality of this device, and in my prepared statement, I refer to an even more recent Supreme Court case which, I think, in my judgment as a lawyer, would establish incontrovertibly that the fluid class recovery concept is unconstitutional. That case is *Warth* v. *Seldin*.[1] It is reported in 422 U.S. 490. It is a 1975 decision of the Supreme Court which rejected attempts to secure damages from municipal officials. It was a case in which the various organizations of tenants, of public interest groups, and of homebuilders, were seeking damages for restrictive zoning practices where minimum lot sizes were established. And the plaintiffs were seeking, not only injunctive relief, but also damages on behalf of a massive class of persons who might have wanted to move into that area.

The Supreme Court rejected that attempt on constitutional grounds, and the language, I submit, is precisely inconsistent with the language of this bill. It is as if the staff, when it drafted this bill, was trying to take the constitutional holding of *Warth* v. *Seldin*, and purport to overrule it with this legislation. The language of the bill, to which I refer, is the portion of the fluid recovery section which says that damages can be assessed and proved—this is page 58, line 1 of the committee print of the bill—without separately proving the fact or amount of individual injury or damage.

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[1] See p. 515.

I would like to read the language of the Supreme Court in the *Warth* case, and have the committee compare it: Moreover, in the circumstances of this case, which are analogous, I believe, to the parens patriae case, the damage claims are not common to the entire membership, in the sense that there was an injury to the whole class, nor shared by all in equal degree. That is certainly true with respect to alleged injuries to consumers. Some may be injured; some may not be. Even those who are injured are going to be injured in different degrees. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and I continue with the quotation, both the fact and extent of injury would require individualized proof.

It seems to me that it is incumbent upon this committee, as the chief spokesman for the Senate on matters of constitutional law, to reject the device which S. 1284 purports to codify into statute law in light of this objection and the plain repudiation by the courts of the concept itself.

Senator BURDICK. Do you know of any contrary holdings which you have given us this morning?

Mr. LACOVARA. There are some district court cases which have said, at least in preliminary stages, that they will not dismiss cases of this sort. To my knowledge, Senator Burdick, there is no case which has gone to judgment with the court finally sustaining the fluid class recovery concept.

Senator BURDICK. You know of no contrary opinion to *Eisen*?

Mr. LACOVARA. In no circuit, no, sir.

Senator BURDICK. They specifically refer to the constitutional problem?

Mr. LACOVARA. Yes, sir, in the language that I quoted to you, they specifically branded fluid recovery as an unconstitutional device that violates the due process clause.

Senator HRUSKA. Will the witness yield for a question?

Mr. O'Leary?

Mr. O'LEARY. Was the Worth case an antitrust case, sir?

Mr. LACOVARA. No; it was not. It was a civil rights case. But I do not believe that makes any difference in terms of constitutional procedure.

Mr. O'LEARY. Did that involve a standing of common law or standing pursuant to some cause of action created by the statute?

Mr. LACOVARA. It involved, essentially, standing to sue under the civil rights statutes and common law standing, and the Supreme Court dealt with the problem in all of its ramifications. It said that there are certain prudential rules of standing which involve the Court's refusal to hear cases by people who have some concrete interest in a case.

And in those instances, where there is some minimal interest, Congress may be able, by statute, to authorize standing. It then went on to say, as I quote in my statement, that despite any congressional attempt to confer standing, there still must be satisfied the minimal requirements of article III.

Mr. O'LEARY. With respect to the *Eisen* case that you made reference to and, specifically, that *Eisen* decision which you quoted, was that circuit court opinion vacated in its entirety by the Supreme Court?

Mr. LACOVARA. That same question came up at the hearing of the subcommittee. The judgment was vacated because the Supreme Court sent the case back for further proceedings. I do not think that you can

interpret the court's action as in any way inconsistent with the circuit court's opinion.

It was certainly not a repudiation of Judge Medina's position. Indeed, on those points on which the Supreme Court found it necessary to rule, they specifically affirmed the reasoning of Judge Medina for the circuit court. So, I think it would be wholly unfair and unwarranted to interpret the vacation of the judgment as casting doubt on this aspect of its holding.

Mr. O'LEARY. They did not reverse and remand in that situation, though they did vacate; is that not correct?

Mr. LACOVARA. That is not an uncommon device when the cases are being sent back for further proceedings, in my experience in Federal courts.

Mr. O'LEARY. Would you agree that it is a fair statement that lawyers disagree as to what the three *Eisen* cases really mean?

Mr. LACOVARA. Oh, I am sure you could find lawyers to disagree on whether the 14th amendment applies to the States. I have seen lawyers take that position in the Supreme Court, Mr. O'Leary. All I can do is give you my best judgment and call your attention to the case authorities on which I rely. And that is what I have tried to do this morning.

Senator HRUSKA. Mr. Lacovara, is disagreement of lawyers as to the meaning of a court decision a normal or an abnormal element?

Mr. LACOVARA. It is hard to imagine any court decision that lawyers do not disagree about, particularly the lawyers who have lost it. That, I think, is one of the reasons we are here this morning. As Mr. Wiggins said, we probably would not be here this morning if the courts had not been rejecting, rather consistently, the efforts of the Plaintiff's Bar to exalt procedural expediency over basic concepts of fairness and sound public policy.

Senator HRUSKA. As a matter of fact, many lawyers take it quite philosophically. They say, "Well, it is not right and we disagree with it. But the Supreme Court is the last guesser and we are going to have to accept it."

Mr. LACOVARA. That is true. And in this area, I am quite content to rest on the Supreme Court decisions. I would urge the committee, despite whatever power it may have to overrule court decisions which are based on statutory interpretations—and I think we would all agree that even the Congress does not have the authority to overrule Supreme Court decisions based on constitutional principles—not to attempt that. As Mr. Wiggins said so eloquently, what is at bottom involved here is a matter of public policy. And certainly, anyone who reads the decisions that we have called to the committee's attention this morning, has to come away with the very strong impression that the reason the courts have been rejecting these attempts, has been their practical sense that these devices just are not well proportioned to the objectives that are allegedly being served. There are certainly some constitutional overtones, if not constitutional holdings, involved in these cases.

Senator BURDICK. Mr. Chairman?

Senator HRUSKA. Yes, Senator Burdick.

Senator BURDICK. On this brief here, what was the holding in *California* v. *Frito-Lay*?

Mr. LACOVARA. *California* v. *Frito-Lay* was a case specifically rejecting the effort of the attorney general of the State of California to bring a consumer class action against manufacturers and vendors of, among other things, potato chips. He sought to sue as parens patriae, and the court, in that case, held that such a device was not authorized.

Senator BURDICK. Did they vote on that on constitutional grounds?

Mr. LACOVARA. The Court did not find it necessary, specifically, to get to the constitutional question. It said that the device was not authorized as a matter of statute; saying, in effect, the attorney general's authority as parens patriae did not extend to suing for alleged individual injuries.

Senator BURDICK. Did the Court indicate that they might correct it by legislative action?

Mr. LACOVARA. The case, Senator Burdick, has been apparently proposed to this committee as supporting the view of the proponents of legislation that Congress could institute this device. I do not think that is a fair reading of the case. The language was to this effect: That there may be a problem here with consumer injuries that are not handled under current law and Congress should take a look at it.

The Court was not, in advance, ratifying parens patriae legislation. What I think it can be fairly understood as saying, is that some device such as the type that Congressman Wiggins was proposing this morning, would be an apt legislative response; something like a civil fine. That is what the language of the case suggests. The Court specifically says, and I quote the language from page 474 F 2d, page 777:

> It would appear that the State is on the track of a suitable answer. Perhaps the most suitable yet proposed to problems bearing on antitrust deterrents and the class action as a means of consumer protection. We disclaim any intent to discourage the State in its search for a solution.

I think that can hardly be interpreted as saying, if Congress enacted this device, this solution would be upheld.

Senator BURDICK. And Kline was decided after this and the *Eisen* case was decided after that, and the Supreme Court case of 422 U.S. 490 was decided after that?

Mr. LACOVARA. Yes, sir.

Senator BURDICK. Would it be difficult or asking too much if you kind of digested these cases that you refer to in this testimony and put it in a minibrief for us?

Mr. LACOVARA. I would be pleased to do that and submit it to the committee.[1]

Senator BURDICK. On this constitutional question.

Mr. LACOVARA. On the constitutional question.

I have adequately summarized the point that I wish to make. I understand that there is another witness who is waiting to testify and I do not want to infringe upon any time the committee has set aside for that. So, if the committee has any further questions, I will be happy to try and respond to them. Otherwise, I have completed my statement.

Senator BURDICK. You mean to say that in the *Tetracycline* case you paid $100 million and when the case finally came to trial, you were found innocent of wrongdoing?

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[1] See supplemental statement of Mr. Lacovara, p. 124.

Mr. LACOVARA. Yes, Senator Burdick. My present client did that. We were not representing them at the time, but I do not mean to imply any criticism of the judgment that was made.

Senator BURDICK. You made a big mistake in settling, did you not?

Mr. LACOVARA. Well, the problem is, in that area, as in so many areas of the antitrust laws, we are not talking about bright-line distinctions. The proponents of this legislation say that it is necessary to deal with vicious kinds of price-fixing cases; the kind of sordid conduct which we would all agree ought not to go on. The bill, however, is not confined in its potentially ruinous consequences to the kind of deliberate, knowing violations of the antitrust laws. Among the allegations involved in the *Tetracycline* case were those of attempts to monopolize; questions that are very difficult to predict, and until the case gets to the Supreme Court, it is difficult for lawyers and businessmen to know how it is going to come out.

The same thing, of course, applies in "rule of reason" cases. So, although the courts have finally exonerated Bristol-Myers and the other defendants, the risk that the courts might come out the other way is what led to what we consider a blackmail settlement. And that is the basic vice with this legislation.

Senator BURDICK. Is the fourth circuit case going on? Did you attempt to appeal to the Supreme Court?

Mr. LACOVARA. There is 90 days to file a certiorari petition in a civil case. That time has not yet run and I do not know whether the State will file a petition. Mr. Sprole advises me that Bristol-Myers is not aware of any intention by the attorney general of North Carolina to seek Supreme Court review.

Senator HRUSKA. Mr. Lacovara, have you any information as to the disbursement of the funds, the settlement funds of the *Tetracycline* case? You indicated in your statement there was a $100 million settlement and that some $30 million was ostensibly paid as compensation to consumers. Where is the rest of the money?

Mr. LACOVARA. The rest of the money, Mr. Chairman, was allocated to other classes that would maintain——

Senator HRUSKA. Other classes and consumers?

Mr. LACOVARA. Yes, sir. Retailers, wholesalers, hospitals, competitors.

Senator HRUSKA. Is it all paid out?

Mr. LACOVARA. I believe most of the money has been disbursed.

Senator HRUSKA. Would the court records indicate the various classes by way of summary?

Mr. LACOVARA. We can furnish the committee with a current status report on where the funds have gone.

Senator HRUSKA. That would be helpful. I imagine there are some court costs.

Mr. LACOVARA. Oh, there are enormous costs to the administration of settlement.

Senator HRUSKA. Did the plaintiffs of the attorney general get any attorney fees?

Mr. LACOVARA. The private plaintiffs' attorney fees, I believe, were finally set at $10 million. When David Shapiro, who was lead counsel, testified before the subcommittee last year, he said that his firm's fees were between $6 and $7 million for the *Tetracycline* case.

Senator HRUSKA. Whose fee?

Mr. LACOVARA. The firm of the lead counsel for the plaintiffs, the firm retained on a contingent-fee basis by various State attorneys general. And his firm was paid between $6 and $7 million as its compensation. That, as Mr. Wiggins said this morning, is one of the problems with this device.

The House Judiciary Committee has forbidden contingent-fee arrangements. But, as Mr. Wiggins said, the enormously lucrative aspect of bringing cases of this sort with a fairly firm expectation that the cases will be settled for large amounts, means that there will be no end of cases that are brought without necessary regard to the merits.

Senator HRUSKA. When you and I went to law school, we heard of the concepts, champerty and maintenance and barratry. Is any of that involved, at least conceptually, in a situation like this?

Mr. LACOVARA. Well, it is certainly an implicit premise, Mr. Chairman. First of all, the Senate bill, S. 1284, requires the U.S. Attorney General to notify all 50 State attorneys general whenever he thinks they may have grounds to sue.

That certainly sounds like a stirring-up litigation to me. We know from practical reality that what the State attorneys general are likely to do is to hire private counsel. We also know that the number of States joining in a particular suit with the same private counsel tends to expand—I am not privy to how the decision is made or who takes the initiative in bringing the suit by private counsel.

Senator HRUSKA. In the olden days there was another practice that was engaged in by governments. I wonder, is there any similarity or is there any common nature between the practice in olden days of farming out to individuals the collection of taxes and they would do it in one of two ways: The contractor or the private party would either bid so much for the taxes that were delinquent as of a certain year or he would undertake it on a contingent basis. His methods of collection were sometimes conscienceless, sometimes they were harsh and abrasive and maybe oppressive and constituted a harassment. Some taxes were collected and usually he was quite well repaid for his efforts; that was kind of a private tax collector. But that was discontinued. Why was it discontinued?

Mr. LACOVARA. Well, because of the obvious abuses that were involved and the obvious undesirability of having public rights enforced by private persons who are going to profit from it.

I am not going to accuse my brothers at the bar who bring plaintiffs' antitrust cases of being abusive, but there is certainly an anomaly in having cases of this sort contracted out, private plaintiffs. As I say, the House has dealt with that problem by forbidding contingent-fee arrangements. So, if the State feels this is a meritorious case, the State could invest its own resources in maintaining it, the same way that any other litigant seeking a damage recovery makes his own judgment as to whether or not his resources should be invested in this.

Senator HRUSKA. In was not my intention to suggest that there was a parallel or an analogy to modern lawyers and ancient private tax collectors—that was farthest from my mind—because I spent 25 years in the practice of law before I entered into the membership of the body where I am now serving and I know something about lawyers and the way they operate. I know they are fine, upstanding, upright people and doing the best that they can.

Mr. LACOVARA. I certainly agree with that sentiment, Mr. Chairman.

Senator HRUSKA. Anything further, Senator Burdick?

Senator BURDICK. No.

Senator HRUSKA. Thank you very much for coming, Mr. Lacovara.

Mr. LACOVARA. Thank you.

[The prepared statement and supplemental statement of Mr. Lacovara follows: Testimony resumes on p. 129.]

PREPARED STATEMENT OF PHILIP A. LACOVARA *

I appreciate the opportunity to present my views to the Committee on Title IV of S. 1284 on behalf of Bristol-Myers Co. Title IV is meant to fill an apparent gap in the antitrust laws, whereby small individual injury occasioned by antitrust violations affecting consumers provides insufficient incentive for private treble-damage actions. Title IV proposes to plug this alleged gap by the device of a *parens patriae* suit, under which State attorneys general would be authorized to sue for treble damages on behalf of all natural persons residing within their States. But this is no solution, and indeed would create problems at least as severe as those which it is intended to remedy.

A detailed examination of all the legal and technical problems of Title IV would consume many pages. Last June, my partner Jerome G. Shapiro testified before the Subcommittee on Antitrust and Monopoly, explaining in detail various legal and constitutional problems with Title IV. At this time I shall address only some of the fundamental misapprehensions which Title IV, if unaltered, would codify into bad law. The first is this: however unjust it is for consumers to suffer economic injury occasioned by antitrust violations—and indeed it is unjust—direct compensation to large consumer classes through court-awarded damage recoveries is a myth; it just does not happen. If the monetary stake of the individual consumer is insufficient for him to display interest in a Rule 23 class action brought by private counsel, even to the extent of responding to court ordered notice, why should anyone think that these same consumers will take the steps necessary to claim a share in any settlement or recovery in a proceeding brought by a State lawyer? In this regard, it must be understood that even under the so-called "fluid recovery" concept, which allows damages to be awarded to a whole "class" without any proof of injury to individual class members, no money reaches the individual class member until he has come into court to demonstrate his entitlement to a share in the recovery fund. Thus even a *parens patriae* proceeding calls for a fair degree of consumer initiative and as such is at odds with the basic premise underlying its supposed necessity—that consumers will not take the initiative where their individual monetary stake is so small.

This exposure of the misleading nature of the *parens patriae* concept is not merely my theoretical analysis it reflects the experience of large consumer class actions. An example is the tetracycline antibiotic drug litigation. Those dozens of cases were brought in the name of many classes of competitors, governmental entities, wholesalers, retailers, and consumers, who alleged pricefixing and other antitrust violations in the production and distribution of tetracycline and related drugs. In those civil suits and the related criminal case, there was never any final finding of liability; nevertheless, the defendants were forced to protect themselves by reaching settlements totaling over $100,000,000. Over $30,000,000 was ostensibly paid as compensation to "consumers", but less than 30 percent of that sum ever reached the purported beneficiaries. Even though the products involved—prescription drugs—were uniquely regulated and subject to record-keeping provisions, only a tiny fraction of the consumers allegedly interested were located or came forward to claim a share.[1] It was a situation in which the potential individual recovery was measured in dollars, whereas in most consumer product litigation individual recoveries would probably be measured in pennies. Nevertheless, despite a financial stake greater than what one would expect to be the norm in *parens partriae* litigation, relatively few of the affected consumers stepped forward to claim their shares of the settlement fund. This

* Partner, Hughes Hubbard & Reed, Washington, D.C.

[1] The number of consumers who submitted provable claims was far less than 30 percent of the alleged class, since there were a significant number of claimants whose intensive use of the drugs meant they were entitled to larger than normal shares.

experience should make clear that whatever other benefits are claimed for *parens patriae* actions, they provide little realistic prospect for *direct* compensation to injured consumers.[2]

But what of other benefits? Again, the tetracycline experience is instructive. Aside from hefty lawyers' fees, recoveries from the settlement fund in the tetracycline litigation went to support a variety of local social welfare projects. Many of the programs were probably worthwhile, but funding specialized projects is a far cry from paying "compensation" to injured consumers, other than in the simplistic sense that arguably "good" things were being done with the settlement money to compensate for the allegedly "bad" things done to overpaying consumers. Sometimes in the law we penalize wrongdoers by exacting fines that will be used for the general public welfare, but in those instances the policy choices are faced candidly, and no one is under the illusion that "compensation" is being made to injured individuals. But as to one of Title IV's major premises there is an indisputable conclusion: that whatever else Title IV would do it would provide little direct or indirect "compensation" to consumers.

In Title IV will not compensate consumers, the question next arises whether it will be socially beneficial by deterring antitrust violations resulting in consumer injury. Measuring deterrence under the best of circumstances is an imprecise science, since it is always difficult to predict which punishments will deter which type of conduct. Witness, for example, the seemingly endless debate over the death penalty. In the context of enforcement of the antitrust laws, analysis is made even more difficult by the fact that Congress only recently amended the Sherman Act to provide for a substantial increase in the severity of penalties for violation of the antitrust laws.

It is far too early to evaluate the degree of incremental deterrence that can be traced to these recent amendments; consequently, it is equally difficult to determine how much, if any, additional deterrence is needed.

There is an additional problem: whether to increase the severity of any penalty must be judged by measuring the likely increase in deterrence against the corresponding increase in hardship and adverse collateral consequences. Let me illustrate by a simple example. In most states it is a form of larceny knowingly to purchase goods with a bad check. Nevertheless, through neglect or inadvertence, almost every otherwise decent, law-abiding citizen at one time or another has found himself overdrawn on his checking account. The law provides criminal penalties for intentional violations, and usually one must compensate the recipient of the bad check for the financial injury he suffered. Suppose that in an imaginary jurisdiction tendering a bad check became an offense punishable by death. Certainly as to those whose conduct was intentional the increased severity of the sentence would weigh rather heavily in any calculation whether to engage in conduct intentionally to defraud. As for the remainder of the population, however, the increased penalty would not serve to diminish the human capacity for error. Still, few would run the risk of incurring the penalty, and many would therefore refrain completely from using checks. As to those whose conduct was unintentional, then, the net effect would be a minimal increment in deterrence but a rather substantial reduction in the use of checks and a much greater reliance on a less sophisticated medium of exchange. Perhaps more importantly, by failing to distinguish between purposeful and negligent conduct, our hypothetical law would in some instance result in the imposition of cruel sentences out of proportion to the severity of the crime. One could hardly call the net effect desirable.

In the context of the present legislation, the situation is equally murky. There has been no consideration whatsoever to making the careful legislative judgments that should be made. Is the marginal deterrence against willful antitrust violations going to be so much more effective than the recently increased threat of major criminal fines and felony jail sentences to justify the potential consequences of unprecedented "damage" awards? What will be the effects on the economy in general or on particular industries of judgments (or settlements) stripping hundreds of millions of dollars from corporate defendants and their shareholders and transferring these sums to unspecified "general welfare" projects? And perhaps most importantly, how much legitimate, creative American enterprise will be stifled because corporate executives will be forced to forego

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[2] It also bears noting that, even though the defendants were forced to pay out enormous sums to settle the massive claims against them, subsequent litigation with non-settling plaintiffs led to judgments that the defendants had not violated the antitrust laws at all. The tetracycline litigation, therefore, vividly illustrates the "blackmail settlement" corollary to the *parens patriae* concept.

business ventures and expansion lest they expose their shareholders to monumental claims filed under the *parens patriae* device?

Not only must this Committee consider the effects of Title IV on those who would violate the antitrust laws; it also must consider the bill's effect on those whose conduct is entirely blameless—and I think all would agree that this characterization fits the vast majority of American business. The health of our economy is premised upon vigorous competition, and generally speaking, the more vigorous the competitor the more he is to be encouraged. At some point in the continum, however, aggressive competition turns vicious and may run afoul of the antitrust laws. The length and the complexity of antirust litigation attests to the fact that the location of this point is rarely easy to predict with anything approaching certainty; indeed, most antitrust litigation revolves less around the determination of particular facts than around the legal characterization to be given stipulated practices. Reasonable men—and even reasonable courts—disagree as to whether a given set of facts should be characterized as constituting a violation of the antitrust laws, although there is a narrowly defined class of behavior that is illegal per se. If we are to encourage innovation and competition that is maximally creative, we should indeed be wary of punishing too heavily those who inaccurately predict that a proposed course of conduct is consistent with the antitrust laws.

The damage provisions of Title IV are nothing less than revolutionary. First, the bill would permit the award of damages for injuries caused to something called the State's "general economy". In testimony before the Subcommittee on Antitrust and Monopoly of this Committee, few, including the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, were able to identify or define a State's "general economy" and explain how one could possibly identify, much less quantify, damages to it. For this reason the Administration has opposed awarding damages for injuries to a State's "general economy", and in the House verison of Title IV, H.R. 8532, a similar provision was wisely deleted.

Even more startling is the provision that would permit award of damages to a class without any determination as to the fact or amount of injury to class members. Some proponents of Title IV have been commendably candid in admitting that they favor these damage provisions because in their experience it has proved extremely difficult to demonstrate how antitrust violations damage individual class members. This is a remarkable argument in favor of "fluid class" recovery. It says, in other words, that where public opinion has stamped a particular class of defendants as nasty characters, and where they have been accused of having done nasty things, and where it is difficult to prove whether they injured consumers, Congress and the courts should simply dispense with the necessity for proof!

It is indeed difficult to prove the manner in which an antitrust violation results in economic injury to consumers. This very difficulty suggests a necessity to examine the economic premise—that consumers are directly and demonstrably injured by antitrust law violations—that underlies Title IV. Instead of doing this, Title IV submerges all obstacles to disproof of the premise so ardently assumed. Where anticompetitive activity results in an illegal overcharge by a manufacturer, that overcharge may be absorbed in whole or in part by some wholesalers and not others who may or may not choose to pass on their increased costs to some retailers but not others. The same variables operate at the retailers' level. And, of course, with many component products, the number of levels of the distribution system through which they pass before reaching consumers may be even greater. If this sounds complex, it is, and tracing the impact of an alleged illegal overcharge through the myriad channels of distribution to separate those consumers who have been economically injured from those who have not is a complicated, time-consuming, and expensive process. The reason is obvious: the process reflects the complexity of the underlying transactions.

But dispensing with the requirement of proof of individual injury is not a solution that comports with fundamental principles of due process of law. Fundamental fairness requires that a person accused of doing something improper not be forced to pay "compensation" for injuries unless he has in fact caused them. And in our legal system causation is established by proof, not by conjecture. There is nothing unique about antitrust principles in this respect and it is difficult to see why "damages" should be recoverable by consumer classes without proof of actual injury in antitrust cases when it would be unthinkable to provide for such entitlement in the case of, for example, a breach of a supply con-

tract which may or may not ultimately have some effect on the prices paid by consumers. It is simply no answer to say that there should be especially intense deterrence and especially summary procedures for possible antitrust violations. Shooting random antitrust defendants or returning to the days of trial by ordeal might also result in greater deterrence, and would certainly be less time consuming, but our legal system is of course based on due process of law. Title IV, unfortunately, in its headlong effort to "do something" for consumers is insensitive to the means being chosen to achieve that end.

The constitutional error in authorizing lawsuits for the recovery of damages for "injuries" that are not proved in the adversary setting is compounded by the attempt to authorize State attorneys general to bring these suits. The "standing" requirements embodied in Article III of the Constitution require that suits may be brought only by persons who have suffered injury themselves and who as a consequence have a personal stake in the outcome of the litigation. Just last spring, in *Warth* v. *Seldin*, 422 U.S. 490 (1975), the Supreme Court explained that, even though Congress has some authority to create a right of action for persons who would otherwise be barred from suing "by prudential standing rules, [o] f course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury *to himself*, even if it is an injury shared by a large class of other possible litigants." (Emphasis added.) Thus, it is doubtful whether Congress can validly authorize a State attorney general to sue for damages if neither he nor the State can allege and prove "a distinct and palpable" personal injury. In *Warth* the Court also rejected, on constitutional grounds, the premise of fluid class recovery by holding:

> "Moreover, in the circumstances of this case [which are comparable to a *parens patriae* suit for damages to a class of consumers], the damage claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered, is peculiar to the individual member concerned, and *both the fact and extent of injury would require individualized proof.*" (Emphasis added.)

Section 4C(c)(1) of Title IV would run afoul of this express holding by purporting to dispense with what the Court in *Warth* said cannot be avoided, for that section purports to allow "damages" to be "proved and assessed in the aggregate . . . *without separately proving the fact or amount of individual injury or damage* to such natural persons." (p. 57, *l.* 23 through p. 58, *l.* 2). This Committee can scarcely counterance such a transparently unconstitutional device.

By disregarding the constitutionally-mandated law of standing and by disregarding the dictates of due process of law, Title IV would create massive liabilities on a scale analogous to the overkill discussed in the bad check hypothetical above. To be sure, such a remedy might well add additional deterrence against those who would *willfully* violate the antitrust laws. However, as to those whose violations were not willful, the damage provisions, which cannot be justified in the name of consumer compensation, would extract a penalty entirely out of proportion to any wrongdoing.

This consequence is particularly egregious for the vast majority of businessmen whose conduct is totally consistent with the antitrust laws. The courts have generally refused to accept the *parens patriae* or "fluid class recovery" concepts in litigated cases because, among other reasons, of a recognition that the mere filing of a *parens patriae* complaint will generate enormous pressures to settle, a sort of institutionalized blackmail. The tetracycline litigation, discussed above, illustrates this. That case involved one of the earliest uses of the concept, before the judicial recognition of its problems had time to evolve. Once a *parens patriae* complaint is filed, with possible recoveries reaching the hundreds of millions of dollars, how could a prudent businessman, still presumptively innocent of any wrongdoing, fail to reach an out-of-court settlement? The *parens patriae* concept is, in short, the mechanism for systemized injustice. Thus, apart from the legal and constitutional issues, it would be most unwise for Congress to give its stamp of approval to this now discredited device.

Violators of the antitrust laws need not retain their ill-gotten gains, and intentional violations need not go undeterred or unpunished, even if the *parens patriae* concept is rejected. If the Committee is satisfied that large numbers of antitrust violations are going undeterred and that major corporations are retaining illegal profits—assumptions that have yet to be substantiated—there are other ways to deal with those problems. Title IV, however, is fatally flawed and cannot legally or practically satisfy what its proponents claim to be its objectives.

66-475—76—9

Supplemental Statement of Philip A. Lacovara on Constitutional Issues Raised by Proposed "Fluid Recovery" Damages Provisions of S. 1284

During my testimony before the Committee on March 3, 1976, I referred to some of the cases casting grave doubt on the constitutional validity of those provisions of Title IV of S. 1284 that would codify the judicially discredited "fluid class recovery" mechanism. Those provisions, proposed Sections 4C(c)(1) and (2), would authorize "damages" in any *parens patriae* suit brought by a State attorney general—as well as in any private antitrust class action brought on behalf of natural persons—to be "proved and assessed in the aggregate" on the basis of statistical estimates "without separately proving the fact or amount of individual injury or damage to such natural persons," and would provide that the fund so created should be distributed in accordance with state law or as the district court may "in its discretion" authorize. These provisions raise several levels of constitutional problems. I intend merely to point out these problems without embarking on a full analysis of them.

I. Actual Proof of the Fact and Amount of Injury is Constitutionally Required

The avowed object of Title IV is to overrule a long and growing line of cases holding that class actions for alleged injuries to large numbers of consumers, whether brought by State attorneys general or by private counsel, cannot be maintained under Rule 23 of the Federal Rules of Civil Procedure. Although many of the decisions speak exclusively in terms of the requirements of Rule 23, other courts have frankly recognized that the Advisory Committee which drafted Rule 23 was guided by basic concepts of due process and fundamental fairness. Thus, berfore this Committee recommends dispensing with those requirements of Rule 23 which the courts have held to preclude entertaining massive actions for consumer claims in litigated cases, the Committee must consider the Constitutional underpinnings of such requirements as actual notice to interested persons, actual proof of injury, and the trial of damage claims by jury. Respect for Constitutional rights is frequently inconvenient, and often interferes with what some persons would consider expedient. Title IV rather brazenly disregards these vital concerns.

A. PROOF OF ACTUAL INJURY

The crux of Title IV seems to be the aggregation-of-damages provision. One feature of this section would dispense with the need to prove "the fact or amount of individual injury or damage." This language is designed to repudiate the cases holding that such proof is required in a Rule 23 class action and that the need to have such issues proved individually before a jury (if demanded) renders massive consumer class claims "unmanageable" within the meaning of Rule 23. But the attempt to wipe out that requirement of actual proof by legislative fiat is impermissible. The desire to deal with the unmanageability of these individually minute claims cannot justify an attempt to abrogate the underlying Constitutional requirements which Rule 23 codifies.

It is axiomatic in our legal system that damages can be claimed by one person from another only upon adequate proof (a) that the defendant committed a legal wrong; (b) that the wrong actually injured the plaintiff; and (c) that the plaintiff suffered damage in a reasonably ascertainable amount. Title IV's provision for recovering alleged damages to consumers in a *parens patriae* action cannot avoid these requirements. The Supreme Court's treatment of the "pass-on" issue in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), illustrates the point. There, an antitrust defendant contended that the plaintiff whom the defendant had allegedy overcharged in renting certain machinery to it had not borne the financial injury but had "passed on" the overcharges to the persons who purchased the goods the plaintiff manufactured with the machinery. The Court rejected the defense on sound economic and policy grounds, holding the possibility of recoupment from others irrelevant. The Court quoted (392 U.S. at 490) Justice Holmes' opinion in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533–34 (1918):

> "The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss . . . . The [defendant] carrier ought not to be allowed to retain his

illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum . . . ."

The Court in *Hanover Shoe* explained why the law does not ordinarily treat the ultimate consumer as the person injured by an antitrust violation committed by someone in the manufacturing/distribution chain with whom the consumer did not deal directly. Justice White's opinion noted that the "mere fact that a price rise followed an unlawful cost increase" does not show that the increase was the result of the violation. (392 U.S. at 493 n. 9) The consumer would be the injured party entitled to sue for damages only in the rare case where it was *provable* that an illegal overcharge had automatically been "passed on" to him—and if there were several levels of business activity between the violator and the consumer, the plaintiff consumer would have to prove a pass-on at each level. The Court thus aptly noted that, since proving that the ultimate consumer rather than the immediate purchaser was the injured party "would require a convincing showing of virtually unascertainable figures, the task would normally prove insurmountable." 392 U.S. at 493.

Unavoidable but impossibly speculative requirements of actual proof were also recognized in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), where the Supreme Court refused to recognize a State's claim to sue as *parens patriae* to recover damages to it's "general economy" allegedly occasioned by an antitrust violation. Justice Marshall's opinion for the Court pointed out, among other things: "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrut laws to provide a remedy for all injuries that might conceivably be traced to an antitrust violation." 405 U.S. at 263 n. 14. The Court also held that, in authorizing treble damage suits by a person "injured in his business or property", 15 U.S.C. § 15, Congress was referring "to commercial interests or enterprises". 405 U.S. at 264. This focus reflects the almost imponderable difficulties of establishing whether consumers are injured in any amount and what that amount could conceivably be. Congress cannot validly sweep away these practical problems of proof of injury in antitrust cases—or any other cases—by simply declaring such proof unnecessary. See, *e.g.*, *Leary* v. *United States*, 395 U.S. 6, 29-36 (1969).

Title IV would stand on its head these settled principles by jumping down to the consumer level and substituting surmise and speculation, on a class-wide basis, for proof of actual individual injury. Such a facile device cannot be sustained. Depending on the myriad ways in which a particular product reaches a particular consumer, he may or may not have absorbed some or all of an illegal overcharge collected by the manufacturer of that product—or, even more remotely, of some component of it. That must be a matter of proof on an individual basis, and if a jury trial is demanded, the fact *and* amount of injury must be made the subject of a jury's consideration. Otherwise, there is a real danger that duplicative damages will be assessed: on the basis of actual proof of injury by a commercial purchaser and on the basis of estimates and aggregation at the consumer level. It was for this reason, in part, that Justice Marshall—certainly no foe of efforts to assure justice for the wronged—stated flatly in his opinion for the Court in *Hawaii:*

> "*Parens patriae* actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area. Rule 23 provides specific rules for determining the appropriate plantiff class, establishes who is bound by the action, and effectively prevents duplicative recoveries." 405 U.S. at 266.[1]

In this connection, the Committee must also consider the Supreme Court's holdings in *Warth* v. *Seldin*, 422 U.S. 490 (1975), which had been brought as a class action by individuals claiming to represent others similarly situated and by associations claiming to represent their members. Beyond injunctive relief (which was refused), the plaintiffs sought damages. The Court's analysis in

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[1] Proponents of the "aggregation of damages" device point to cases like *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), and *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), to support its validity. Those cases furnish no such support. In those cases, individual plaintiffs who were directly injured by the antitrust violations of the defendants (with whom they dealt), established both the fact of injury and the amount of damage. All the cases, fairly read, support is the unquestioned proposition that, once actual personal injury is proved, the plaintiff's burden to show the amount of damages can be met if damages are shown with reasonable reliability. The cases say nothing about aggregating claims and dispensing with the need for individual proof.

rejecting the damage claim by a home builders association is instructive. After noting that it was not the plaintiff association that had allegedly been damaged but some of its individual members, the Court continued (422 U.S. at 515–16):

> "No award therefore can be made to the association as such. Moreover, in the circumstances of this case, the damages claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and *both the fact and extent of injury would require individualized proof*. Thus, to obtain relief in damages, each member of Home Builders who claims injury as a result of respondents' practices must be a party to the suit. . . ." (Emphasis added.)

In short, in a group damage action where actual injury to individuals may or may not have occurred, and if it occurred it may have involved different amounts of damages, there is simply no lawful substitute for individual proof of both the fact *and* amount of injury—precisely what Title IV purports to disregard.

B. THE "FLUID CLASS RECOVERY" CONCEPT

The attempt to by-pass these constitutional requirements and settled policies ultimately turns on the "fluid class recovery" device which Title IV would adopt. In essence, the concept disregards the question of actual injury to individual consumers, presumes injury to the class of consumers as a whole, creates liability "in the air," and, in light of the practical disinterest of consumers in tiny *pro rata* shares, provides for the bulk of the "compensation" recovered to be applied to miscellaneous court-approved projects or to escheat to the State.

In the class-action setting this approach has been branded as unconstitutional, and a mere change in labels will not transform it into an acceptable device. The most eloquent statement of this position came in Judge Medina's opinion in "Eisen III", *Eisen v. Carlisle & Jacquelin*, 479 F. 2d 1005 (2d Cir. 1973), vacated on other grounds, 417 U.S. 156 (1974).[2] Judge Medina firmly rejected the attempt to have the "class as a whole" treated as the real party in interest, with the "claims of the individual members of the class becom[ing] of little consequence" (479 F. 2d at 1017–18):

> "Even if amended Rule 23 could be read so as to permit any such fantastic procedure, *the courts would have to reject it as an unconstitutional violation of the requirement of due process of law*. . . . We hold the "fluid recovery" concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper." (Emphasis added.)

Efforts to present this theory elsewhere have met with similar rebuffs on the firmest grounds. For example, Circuit Judge Ely, another judge considered to be in the vanguard of protecting individual rights, nevertheless rejected the plaintiff's arguments in the *Hotel Telephone* case that "the individual questions arising from the damage claims [of an enormous consumer class] can be solved by allowing damages in the form of fluid recovery. . . ." *In re Hotel Telephone Charges*, 500 F.2d 86, 89 (9th Cir. 1974). Distinguishing those instances where this device had been accepted by defendants as part of a settlement (such as in the *Tetracycline Antibiotic Drug Litigation*), Judge Ely's opinion stated:

> "We agree with the decision reached in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), that allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights under the antitrust statutes." 500 F.2d at 90.

In that opinion, Judge Ely echoed Judge Medina's reasoned observation in *Eisen III* that rhetorical statements "about 'disoring sums of money for which a defendant may be liable', or the 'prophylactic' effect of making the wrong-doer suffer the pains of retribution . . . do little to solve specific legal problems." 479 F.2d at 1013. After referring to that language, Judge Ely put the issue this way (500 F.2d at 92):

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[2] At the Committee hearing on March 3, 1976, a member of the Committee's staff suggested that the force of *Eisen III* had been undercut by the Supreme Court's later action vacating the judgment of the court of appeals. Significantly, all portions of the Supreme Court's treatment of Judge Medina's opinion reflect explicit approval of his analysis of the questions the Court found it necessary to reach. It was not his opinion that was vacated, merely the formal judgment of the court of appeals. This action was explained (417 U.S. at 179 n. 16) as allowing the plaintiff an opportunity to amend his complaint, without prejudice, to try to allege a smaller class. The Second Circuit had ordered dismissal with prejudice. And as shown below, other courts have continued to treat Judge Medina's opinion as authoritative.

"The antitrust laws focus on the compensation of parties *actually injured*, presupposing that a *plaintiff can prove that he was in fact injured* as a proximate result of an antitrust violation, *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972). The fact that the injured plaintiff is allowed treble damages does not change the basic nature of the private antitrust action as an action intended to compensate. When, as here, there is no realistic possibility that the class members will in fact receive compensation, then monolithic class actions raising mind boggling manageability problems should be rejected." (Emphasis added.)

An even more insistent posture was adopted by another panel of the Ninth Circuit in the real estate brokerage commission case, *Kline* v. *Caldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974). In that massive class-action case, the Court noted that "plaintiff must prove both that the defendant's conduct contravened section 1 [of the Sherman Act] *and* that the plaintiffs suffered injury as a direct result of the illegal conduct." 508 F.2d at 230–31 (emphasis in original). The Court held that, because "[p]roof of injury is *an essential substantive element* of the successful treble damage action" (598 F.2d at 233; emphasis added), each class-member would have to prove to a jury that he had sustained actual injury resulting from a particular defendant's violation. Judge Duniway's concurring opinion expressed alarm at the practical consequences of entertaining the "judicial juggernaut" that plaintiffs and their counsel sought to create there. 508 F.2d at 236. He insisted that it would be necessary for "each such 'plaintiff' " in the alleged class of 400,000 to prove actual injury *and* the amount of *his* damages. He explained (*ibid.*):

"It is inconceivable to me that such a case can ever be tried, unless the court is willing to deprive each defendant *of his undoubted right to have his claimed liability proved, not by presumptions or assumptions, but by facts*, with the burden of proof upon the plaintiff or plaintiffs, and to offer evidence in his defense. The same applies, if he is found liable, *to proof of the damage of each 'plaintiff'*." (Emphasis added.)

These decisions follow the Ninth Circuit's refusal to entertain a *parens patriae* suit by the State attorney general in *California* v. *Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973), *cert. denied*, 412 U.S. 908 (1973). There the court held the device unauthorized by law, and criticized the *parens patriae* mechanism on grounds equally applicable to the pending legislation: "To a greater or lesser degree these [*parens patriae*] theories attempt to utilize class action principles *without the class action safeguards* so carefully worked out by the drafters." 474 F.2d at 777 n. 11 (emphasis added). Although the court commended the problem of consumer protection to the attention of Congress, it was careful not to endorse the *parens patriae* in balanced safeguards.[3] Later opinions of the Ninth Circuit, as we have seen, make clear that statutory codification of the *parens patriae*/fluid class recovery concept is not the kind of solution to the problem that the court would or could approve.

And other courts as well have rebuffed the *parens patriae*/fluid recovery concept. In *Pfizer* v. *Lord*, 522 F.2d 612 (8th Cir. 1975), the Eighth Circuit ordered dismissal of a *parens patriae* case brought under the antitrust laws by foreign governments on behalf of their citizens. It noted that a "strong preference for class actions over *parens patriae* has been repeatedly expressed" by the courts and that this preference is based on the "safeguards" built into Rule 23 to insure the basic fairness which the *parens patriae* device circumvent. 522 F.2d at 618.

Recently, the District Court for the District of South Carolina, in a lengthy and careful opinion, continued the trend of judicial repudiation of "fluid class recovery" which Title IV would try to overrule. See *Windham* v. *American Brands, Inc.*, —— F. Supp. —— (D.S.C. 1975) (CCH Trade Cas. ¶ 60, 530). The court there refused to tolerate the "'fluid recovery' theory of damages" that had been used in the settlement of the *Tetracycline Antibiotic Drug Litigation*, noting that that approach "has been rejected by subsequent opinions, the reasoning of which this Court adopts" (quoting *Eisen III's* language) (p. 67, 345). The court stated in no uncertain terms that liability and damage must be proved individually, holding: "Aside from proof of liability, determining the amount of damages and a proper distribution thereof would result in *an unfair trial if a fluid recovery approach were utilized*. . . ." (p. 67, 346).

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[3] See 474 F.2d at 776 n. 9, saying of the *parens patriae* device indistinguishable from that proposed in Title IV: "No matter how it is labeled, a basic problem still exists. The class action safeguards of Fed. R. Civ. P. 23 are absent."

The overwhelming weight of judicial authority, therefore, rejects the *parens patriae*/fluid recovery mechanism embodied in Title IV of S. 1284 as an unfair and unconstitutional expedient whose defects cannot be cured by inclusion in a statute.

C. ACTUAL NOTICE

Finally, the premise of Title IV is that there ought to be a remedy for consumers injured by antitrust violations. No one questions the basic principle that the legal rights to be asserted by a State attorney general are those belonging to consumers. It has long been settled that a person whose interests are being litigated in a proceeding to which he is not a named party is constitutionally entitled to notice of that fact and the concomitant opportunity to decide *for himself* whether he wants *his* claim pressed at all, in that suit or elsewhere. Rule 23, as interpreted by the Supreme Court in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), requires individual notice to all reasonably identifiable class members. Proposed Section 4C(b)(1) of Title IV, however, would instead direct that notice of a *parens patriae* action be given "by publication" unless the court finds that such notice would be "manifestly unjust as to any person or persons". Such a procedural short-cut is at odds with the due-process requirements undergirding both Rule 23 and *Eisen*.

In *Eisen*, the Supreme Court expressly noted that Rule 23's provisions requiring actual notice if at all possible were intended by the draftsmen ". . . 'to fulfill requirements of due process to which the class action procedure is of course subject' . . ." 417 U.S. at 173. The Court then noted: "The [Advisory] Committee explicated its incorporation of due process standards by citation to *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and like cases." 417 U.S. at 174. In *Eisen* the Court described *Mullane* as holding "that publication notice could not satisfy due process where the names and addresses of the beneficiaries [the interested persons] were known." *Ibid.* The Court also noted its application of this same principle in *Schroeder* v. *City of New York*, 381 U.S. 208 (1962), where it held that due process "required rejection of notice by publication where the name and address of the affected person were available." *Ibid.*

Thus, Title IV's effort to treat *Eisen* as simply involving a matter of interpretation of Rule 23 and to make notice by publication presumptively sufficient for *parens patriae* actions disregards the undeniable fact that Rule 23's provisions in this regard reflect a constitutional imperative which Congress should not be induced to try to flout.

II. A State Attorney General May Lack Constitutional Standing to Sue

A basic requirement of the Constitutional plan for federal courts under Article III is that these courts can only entertain "cases or controversies". This limitation has been construed by the Supreme Court as having a variety of manifestations, one of which is the requirement that a plaintiff invoking the jurisdiction of the courts to allege that the defendant has done something improper and to seek some redress must establish his "standing" to do so. The Supreme Court's most recent major expression on this point came in *Warth* v. *Seldin*, 422 U.S. 490 (1975). While acknowledging that Congress has some authority to lift certain court-imposed "prudential" barriers to standing, the Court emphasized that Congress does not have a completely free hand in authorizing prospective litigants to represent and assert the rights of others (422 U.S. at 501):

> ". . . Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege *a distinct and palpable injury to himself*, even if it is an injury shared by a large class of other possible litigants. *E.g.*, *United States* v. *SCRAP*, 412 U.S. 669 (1973)." (Emphasis added.)

In that case, the Court denied a variety of plaintiffs, including various trade associations, public interest groups, and individuals the standing to maintain actions for damages or for injunctive relief, under the federal civil rights laws and various Constitutional amendments, challenging a municipality's restrictive zoning practices. The Court held that none of the plaintiffs was able to allege and prove a direct and palpable *personal* injury from the allegedly illegal conduct. Since these principles are founded upon the Constitutional limits on federal judicial power, it would seem plain that a State official could not validly

be authorized to go into a federal court to recover "damages" allegedly incurred by others unless he satisfies the constitutional requirement, codified in Rule 23, that he must be a member of the class he seeks to represent.[4] Otherwise, no matter how worthy the goal, the *parens patriae* device is simply not one the Constitution allows.

CONCLUSION

This Committee certainly has an obligation to oversee the strict enforcement of the antitrust laws. But it has an even higher duty to insure that any mechanisms intended to promote antitrust enforcement comport with overriding interests of Constitutional fairness. While the objectives of Title IV may seem reasonable, the means chosen are simply at odds with Constitutional due process.

Senator HRUSKA. Now, then, Mr. Handler, we have not scheduled your testimony, particularly. We have a little more time and if you will excuse me, I will have to go on to other matters and Senator Burdick will undertake the chair the rest of the hearing this morning.

Mr. HANDLER. Did I hear you correctly that I was not scheduled to appear?

Senator HRUSKA. The list of witnesses that I have here does not include your name.

Mr. HANDLER. But, Senator, I think this is quite outrageous.

Senator HRUSKA. Oh, you are going to be heard.

Mr. HANDLER. Senator, I was called on the telephone; I have been in bed for 2 days; I came at the risk of my health. I was told that I would be given adequate time to cover the entire bill and to my great surprise, I am now told that I am not scheduled as a witness.

I have asked Mr. Chumbris through Mr. Boyden Gray, that I be put on after Congressman Wiggins. Mr. Chumbris, you did not have my name?

Mr. CHUMBRIS. Mr. Handler, during the course of the executive sessions of markup, and we have already had three, it was discussed by some of the members of the Judiciary Committee as to the number of additional days of hearings to be permitted, and one of the suggestions was that due to the many requests to testify, that there be a limitation placed upon the types of witnesses that should be heard. And on that basis, at the suggestion of the committee, there were invited those people who had requested and who had not appeared before the subcommittee in our previous hearings in May and June 1975.

The witnesses were listed as you see on the witness list. However, as Senator Hruska stated, you are here and we will be glad to hear your testimony this morning.

Mr. HANDLER. There seems to have been a regrettable foulup. Mr. Boyden Gray of Wilmer Cutler called my office at least a half-dozen times; yesterday and the day before. And he stated that I was to be a witness today and that you, Mr. Chumbris, had said that it would be impossible for me to go on before Mr. Lacovara, even though I asked that this be done as a matter of courtesy, because I was lying in bed for 2 solid days. First of all, let the record be clear that I did not ask to come here; I was asked to come.

Well, I will proceed with my statement.

Senator HRUSKA. Well, as Mr. Chumbris has said, the limitations of time are not of our making and so, that is one factor. The other factor

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[4] Of course, where the State has itself suffered its own direct injury, its Attorney General may have standing to sue as a representative of a class *of which the State is a member*. That, however, is likely to be the exceptional case, and is already permissible under Rule 23.

is you have testified quite voluminously, but if you have any new material on that, I am sure that Senator Burdick will listen carefully and preside during the hearing.

Senator BURDICK [presiding]. At this point I think it should be understood the hearing will come to an end at 11:30. If you will pace yourself accordingly.

Mr. HANDLER. Senator, I understand and I should not have trespassed upon the time of the committee, if anyone had the politeness to advise me of what the situation was. I was asked to come here.

Senator BURDICK. I know nothing about the arrangements.

STATEMENT OF MILTON HANDLER, PROFESSOR OF LAW EMERITUS, NEW YORK, N.Y.

Mr. HANDLER. May it please the committee, I have a lengthy statement. I had been led to believe that the committee wanted me to cover the bill in its entirety and point out those features which cried out for correction.

[Whereupon, Senator Burdick left the hearing room temporarily.]

Mr. CHUMBRIS. Senator Burdick is on the telephone. I just want to clarify the last point you made. You were absolutely right when you said that you got the telephone calls from the office that you mentioned. But I had to tell the person who called you that the instructions that I had received from the committee was that these were the persons who were to be invited. The person who called you, talked to you a second time, and it was finally agreed that if you desired to come, we would make room for you, which is what we did. But I just wanted to make my point clear. I am just a counsel for the committee and I have to take my instructions from the Senate Judiciary Committee and its Antitrust Subcommittee.

Mr. HANDLER. Mr. Chumbris, while we are waiting for the Senator to return, I would like the record to indicate, because I do not know who is at fault here, that I got a telephone call from Boyden Gray last Thursday asking whether I would be willing to testify. I assumed that he was acting in collaboration with the committee in arranging testimony. I dropped everything; worked on Thursday, Friday, and Saturday to prepare a statement. On Monday and Tuseday I was immobilized with a slipped disc and in great pain, and the doctor advised me not to come here today.

Therefore, we cleared with Mr. Boyden Gray at least six telephone calls yesterday because I wanted to know if I came down here by special arrangements could I go on the first thing in the morning and then return to my bed. He called and said, no; that Congressman Wiggins would be first and Mr. Lacovara would be second and that I would be third. He suggested that I would be on around 10:30. I never would have come here if I had had the facts correctly reported to me.

Senator, now that you are back, may I make the following observation?

Senator BURDICK. Very well.

Mr. HANDLER. I did not come down here to repeat, like a broken phonograph record, the testimony that I have previously presented to this committee. I did, however, want to put this bill in proper perspective, pointing out what improvements had been made since the hearing

and call the attention to various provisions of the bill which demand legislative correction.

I was very pleased, as the result of my correspondence with Senator Bayh, that section 704 had been eliminated. I was also pleased that the *nolo contendere* provisions of the bill, to which I had addressed my objections and my testimony in June, have likewise been withdrawn.

I have been informed, primarily through the press, that the committee has in contemplation a revision of title V, the premerger notification sections of the bill. In the early part of my prepared statement, I indicate the principles that I believe should be followed in the markup in the revision of that title. I shall not take the time to read that part of my statement.

I have examined very carefully the changes that have been made in the declaration of policy. It is my considered judgment that the changes are purely cosmetic and they do not go to the root of the problem.

I am particularly concerned and troubled by the concluding words of section 102–A of title I, and I invite your attention to the wording of that section, appearing at page 36 of the committee print. That section states as one of the policies of Congress, the prevention and elimination of oligopoly power in the economy. Nowhere in the bill is oligopoly or oligopoly power defined. The term is used in economic literature as accordionlike, capable of both expansion and contraction. Economists think of loose, tight, and moderate oligopoly. Economic power is measurable only in terms of a relevant market. Market definition is still one of the thorniest problems in antitrust. The degree of power that can properly be denominated as oligopoly power is not specified in the bill.

So, I ask, is it the intent of this committee to outlaw any business that can be said to possess oligopoly power? Is it equating bigness with illegality? Is it its intent to leave at large the definition of such power by the enforcement authorities and the courts without providing them with any guidance? Will it be the duty of the Justice Department and the Commission to proceed against every so-called oligopoly and seek to have it shorn of its economic power? Does this make most of our major corporations fair game for such attacks by public and private parties including parens patriae suits? Ought a matter of such immense moment to the country, be left in a state of uncertainty? If this section has no legal significance, why muddy the waters and invite unnecessary controversy? If it is intended to have any legal significance, the committee owes it to the Nation to tell it, clearly and unambiguously, what is that significance.

The committee, doubtless, will bear in mind that in this country, we have one-newspaper, two-newspaper, three-newspaper towns. We have towns and cities with two or three department stores. Under anybody's definition, two or three constitutes oligopoly. Is it the intention of this committee to have suits brought against those companies that constitute two or three in any particular industry? If it is, I think this should be clarified. If it is not, likewise, the statute should be clarified.

Now, I turn to and skip in my statement from an elaborate presentation with some novel ideas on how the consumer may be protected without running afoul of the sacred traditions of our country and of our law and consonant with constitutional requirement. But I would like

to run over a series of provisions which trouble me. I invite the Senator to look at section 701(c), which amends section 6 of the Sherman Act.

The essence of this amendment is that every piece of property embraced by any unlawful contract, combination, or conspiracy is to be forfeited to the Government. Such condemnation is mandatory and not discretionary with the courts. This means, for example, where a merger is challenged under the Sherman Act, the properties of buyer and seller are forfeited, if the acquisition is declared unlawful. In price-fixing cases, the product whose prices are conspiratorially rigged, be they electrical equipment, plumbing fixtures, steel, sugar, or other commodities, become the property of the United States after judgment of the legality is entered. In a case such as the *United Shoe Machinery*, all machines subject to the unlawful leases would likewise be forfeited.

I could go on ad infinitum. I can only ask whether the members of this committee seriously intend to impose such a penalty on American business whenever the Sherman Act is infringed. Has the committee given consideration to the fact that in cases involving the same degree of culpability, one defendant may have $100,000 of property condemned where another would be faced with the forfeiture of billions of dollars? So far as I have been able to determine, the prior hearings failed to indicate the whys and wherefores for this radical change. What proof has there been for any need for the amendment? Who is sponsoring it? Has the Department of Justice, which would be responsible for bringing condemnation suits under section 701(c), requested that Congress confer such power and impose such responsibility upon it?

Section 703—I will ask the Senator to turn to that. That section provides that a party's complaint may be dismissed or its answer stricken if it or any person of privity with it fails to furnish discovery on the ground that the law of a foreign country where the evidence is located prohibits compliance of the discovery order. Can you imagine the consternation of this country were any foreign country to enact reciprocal legislation, which would compel an American to violate our laws in order that his pleadings not be automatically stricken and judgment entered against him by a foreign country. This is a problem that has been handled extremely well on a pragmatic basis by our Federal courts without creating any international incidents or complicating the conduct of our foreign relations.

There is very little meaningful testimony in the legislative hearings on the need, purpose, or effect of this proposal. It was specifically condemned by Assistant Attorney General Kauper. I urge the committee to find out who sponsored this section and what are the reasons Congress is being asked to enact it; what need has been demonstrated for any change in the law; what showing has been made that the existing law has not worked out satisfactorily to the interest of all concerned.

I now turn to section 603(c), which provides that any antitrust plaintiff may have access to the grand jury documents and transcripts in any completed proceeding instituted by the United States. Both this section and the forfeiture section to which I have previously averted, are brand new. They appear in the committee print for the first time. There is not a syllable of evidence in support of either measure, and it seems to me it is incumbent upon the committee to let the public

know who is behind these changes and why. Manifestly, the purpose of this provision is to facilitate the prosecution of treble damage suits. The price the Nation is called upon to pay for easing the burden of such plaintiffs is the abandonment of the secrecy of grand jury proceedings—Secrecy that heretofore has been zealously safeguarded by the courts, and which can be pierced only under special and exigent circumstance. I strongly urge that the views of the Attorney General of the United States, the States' attorneys general, the district attorneys, Federal and State, who are concerned with the enforcement of the criminal law be invited so that you get the benefit of their judgment as to what will be the consequences in the enforcement of antitrust by shattering the secrecy that heretofore has enshrouded the activities of the grand jury. I will tell Your Honors this, without qualification, as one who has spend 50 years in teaching and in litigating antitrust, as one who has maintained the largest suits in the Federal courts in behalf of plaintiffs, this section is totally unnecessary and is not required by any antitrust attorney who has skill, experience. and knowledge. Those, in my opinion, who want section 603 are confessing to their own ineptitude and indulance.

Section 701(b) expands the jurisdictional ambit of sections 2, 3, and 7 of the Clayton Act. There is all the difference in the world between a like amendment expanding the jurisdiction of the Federal Trade Commission and saddling the Department of Justice with the responsibility of proceeding against local mergers and price discriminations which are not in interstate commerce and have only an effect on interstate commerce. My proposition is that if the State attorneys general want something to do, why don't they enforce their laws against these local violations, and not add a heavy burden to the Federal authorities to enforce what really should be State law, while in this topsy-turvy world of ours the State attorneys general get into the act to enforce Federal law.

I have some remarks about a new section that was added in the committee print which abandons the traditional adversary system of justice in this country in antitrust cases by turning over the proof of violation or the disproof to the judge, who is to appoint experts, special masters, and other personnel, who will assemble evidence and who will testify.

It makes a shambles of the trial of an antitrust case. Here, again, we do not know who has sponsored this provision, why, what are the reasons, what are the facts; does this come from any experienced antitrust practitioner, or is it the product of some theoretical mind uncontaminated by any practical experience?

I come to my conclusion. I would like permission not only to have in the record my remarks, which relate to parens patriae in depth, but also the manuscript of an article to be shortly published in the Yale Law Journal where we deal with this entire problem of parens patriae proceedings. And I would like to hand up a half dozen copies for that purpose.

Senator BURDICK. Without objection, your full statement will be made part of the record and the brief article will be received for the file.

[The prepared statement and attachment follow. Testimony resumes on p. 167.]

PREPARED STATEMENT OF MILTON HANDLER

Since I testified on S. 1284 before the Subcommittee on Antitrust and Monopoly on June 3, 1975, substantial changes have been made in that bill, both in the Committee Print and in the recent mark-up. I have had some problems with the new matter added to the original measure in the Committee Print as to which there had been no hearings. Some of the revisions in the mark-up, however, have considerably improved the bill. I salute Senator Bayh, the principal proponent of § 704, for abandoning the far-reaching redefinition of the attempt to monopolize offense in Section 2 of the Sherman Act. Once he was apprised of the fact that the Supreme Court and all of the Circuits, save one, required proof of a relevant market and of a dangerous probability of success in monopolizing the commerce in such market, and that this overwhelming weight of authority was supported by the virtual unanimous view of the leading antitrust scholars of the country, he demonstrated the high order of statesmanship which characterizes his service in the Senate by agreeing to the elimination of § 704 from the pending bill. I am also pleased that the *nolo contendere* amendments in Title VI have likewise been withdrawn as I urged at the very outset of my June 1975 testimony.

According to the press, it would appear that major revisions are in contemplation with regard to the pre-merger notification and stay amendments in Title V. Manifestly, no valid objection can be taken to a requirement that the Government be notified before a merger or corporate acquisition occurs. What is wrong is to endow governmental officials with virtually unlimited discretion to halt or delay a proposed merger to the point that it is aborted by the mere passage of time without regard to the merits. We must bear in mind that mergers are neither all good nor all bad. Some enrich, fortify and enhance the vigor of competition; others devitalize competition or create industrial structures inimical to the maintenance of effective competition. The lawfulness of an acquisition depends on the facts of each case. There is no shortcut that can dispense with a thorough and comprehensive inquiry into the relevant facts if our merger law is to serve the public interest and have any semblance of fairness. The enforcement authorities should be given a short period of time after receiving notice of a proposed merger to determine whether or not they intend to challenge it. They should not be permitted to delay the transaction by repeated requests for additional time. They should not be in the position to prevent the merger by their own action or inaction or on their own *ipse dixit* that the public interest requires the prevention of the merger. If they have reason to believe that the merger violates the law, they should proceed in the courts by seeking a preliminary injunction.

A restraining order ought not to be issued as a matter of course nor should the burden of proof be shifted to the defendants as proposed in the amendments offered by Senators Hart and Scott. This inversion runs counter to the traditions of equity procedure and violates every precept of fairness. The granting of a restraining order or the issuance of an injunction should be governed by the standards for preliminary relief which courts of equity normally apply. If these standards cannot be satisfied by the Government, it is unjust to prevent the merger. After all, the Government can institute suit, as it usually does, after the merger takes place. To suggest that the courts are powerless to decree effective relief if the acquisition is found unlawful after trial is to ignore twenty-five years of experience in the administration of the Celler-Kefauver Act. If there were time, I could satisfactorily explain the instances referred to by Senator Hart in the memorandum accompanying his amendments to Title V. If the Committee took the time to examine the facts in those cases it would conclude that no court would have granted a preliminary injunction in any of them at the time they were litigated. In no other branch of the law with which I am familiar is a restraining order issued automatically by a judge without regard to the needs of the plaintiff, the balancing of the equities, and the circumstances of the case. In no other area of the law is the defendant put in a position where he will be restrained by a preliminary injunction unless he can satisfy the judge that he ought not to be enjoined. Mergers are hardly so universally evil in their consequences as to reverse the ordinary order of events and compel the defendants to prove their innocence.

The Judiciary Committee should not put its stamp of approval of a procedure which, in my opinion, is alien to the American system of justice and the rule of law. Only in Alice in Wonderland do we proceed with verdict first and trial afterwards. Let other systems require defendants to prove that they are not in viola-

tion of law; let us stay with the kind of legal system which is intergal to a political democracy particularly in a year in which we are celebrating the inception of our own democracy.

I am informed that changes are being made in Title I, The Declaration of Policy. The latest BNA reports that the declaration is being eliminated, but that seemingly is in error. A distinction must be drawn between a declaration of the goals and purposes of a proposed enactment and statutory affirmations of fact. Reasonable men can differ, and generally do, about the objectives of any piece of legislation. The fact that there is a difference of opinion, therefore, is no reason why the purposes of the legislation should not be made explicit. However, where the declaration consists of findings of facts, the very integrity of the legislative process demands that the facts be correctly stated. I don't believe anyone will disagree with these propositions.

Title I has aroused considerable controversy because the facts concerning the relationship of concentration and antitrust to unemployment, inflation, inefficiency, underutilization of economic capacity, reduction of exports and adverse effect on the balance of payments are conflicting and highly uncertain. There is no general consensus supporting the assertions contained in the Declaration as originally drafted. As one who has spent a lifetime studying these problems, I would say that in my view the weight of the evidence is against the factual recitals of the Declaration. The revisions proposed in the Hart-Scott amendments do not go to the heart of the problem. With all respect, I regard the changes as essentially cosmetic. The revised Declaration is no less objectionable than the original.

I am particularly troubled by the concluding words of Section 102(a) of Title I. That section states as one of the policies of Congress the prevention and elimination of oligopoly power in the economy. Nowhere in the bill is oligopoly or oligopoly power defined. The term as used in economic literature is accordion-like, capable of both expansion and contraction. Economists speak of loose, tight and moderate oligopolies. Economic power is measurable only in terms of a relevant market. Market definition is still one of the thorniest problems in antitrust. The degree of power that can properly be denominated as oligopoly power is not specified in the bill. So I ask—is it the intent of this Committee to outlaw any business that can be said to possess oligopoly power? Is it equating bigness with illegality? Is it its intent to leave at large the definition of such power by the enforcement authorities and the courts without providing them with any guidance? Will it be the duty of the Justice Department and the Commission to proceed against every so-called oligopoly and seek to have it shorn of its economic power? Does this make most of our major corporations fair game for such attacks by public and private parties including *parens patriae* suits? Ought a matter of such immense moment to the country be left in a state of uncertainty?

I strongly recommend that the Declaration be omitted. If it has no legal significance, why muddy the waters and incite unnecessary controversy? If it is intended to have any legal significance, the Committee owes it to the nation to tell it, clearly and unambiguously, what is that significance.

The Committee is to be commended for eliminating from Title IV the provision authorizing *parens patriae* suits for the recovery of damages to the general economy of any of the states or political subdivisions thereof. I addressed myself to the objections to this type of *parens patriae* suit in my previous testimony and am pleased with this revision. I believe that it is vital that Section 405 be likewise eliminated in its entirety.[1] The partal change that is proposed in the amendments before the Committee does not go to the root of the problem. The retroactive application of Title IV would be grossly unfair, would have a serious judicial impact and would add a further element of doubt as to the Title's constitutionality under the due process clause. It is not enough to strike the words relating to class actions and *parens patriae* suits pending on the date of enactment. The same reasons that led to that change apply with even greater force to the remaining part of the section which would give retroactive application of Title IV to cases that are refiled or to cases in which the cause of action accrued before the date of enactment.

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[1] "Sec. 405. This title shall apply to all civil actions filed under the antitrust laws, in which a person representing a class of natural persons or a State is plaintiff, that are pending on the date of enactment of this title or that are hereafter filed or refiled, including those in which the cause of action accrued before the date of enactment of this title."

What this section means is that cases in which *parens patriae* suits were dismissed or consumer classes denied under Rule 23 can be refiled. Since Title IV makes substantial substantive changes in the law, its retroactive application would violate settled principles of due process. What is more, to change the rules of the game in mid-stream runs counter to everything we hold sacred in our system of law.

I propose today to deal primarily with Title IV. I should like to emphasize that the disagreement between the sponsors of this title and those like myself who are in opposition relates not to the ends sought to be achieved but rather to the means selected to attain those ends.

No one challenges the desirability of effectively safeguarding the consumer interest. Most certainly I would not adopt an anti-consumer stance since my earliest work in the law, going back to a period almost fifty years ago, was in lecturing, writing and drafting legislation concerning the protection of the consumer. The issue, as I see it, is how best to protect consumers from injury directly traceable to violations of the antitrust laws without adopting measures that are likely to be counterproductive and create side effects more harmful than the mischief we are trying to correct.

I trust that the sponsors of Title IV will not be offended when I suggest that they may be proceeding on a series of misconceptions that can result in the frustration of the hopes they are placing on *parens patriae* suits as a panacea for consumer injuries.

I had occasion recently together with one of my partners, Michael D. Blechman, to examine the 341 civil and criminal antitrust actions instituted by the Justice Department during the past five years, in an effort to determine the extent to which the antitrust violations challenged in those suits had had any impact on consumers. The results of our study will eventually be published in one of the major law reviews. Because we felt that our analysis should be available to the members of Congress before they register their votes on the Rodino bill, I circulated a draft of our study among all the members of the House of Representatives. I would appreciate it if our text could be included in the record as part of my remarks. I have a sufficient number of copies with me for them to be circulated among the members of the Committee and their staffs.

Only a handful of cases involved price-fixing at the retail level which would directly affect the prices paid by consumers. Except for one of these cases, the suits bordered on the trivial, dealing, for example, with local price-fixing conspiracies in two cities with regard to retail liquor sales. Some of the cases had to do with local price-fixing conspiracies in the sale of cigarettes and soft drinks from vending machines. Two charged local price-fixing conspiracies of shoes and women's clothing, again limited to two cities. Four involved the fixing of charges for automobile repair work and one concerned price-fixing on assembled tour packages for travelers.

The largest single category of retail price-fixing charged by the Government related to fee schedules and codes of ethics adopted by various professional associations and real estate boards. No less than 15 of these suits have been brought against groups of lawyers, architects, engineers, accountants, anesthesiologists, veterinarians and real estate brokers.

The fee schedule cases provide a dramatic example of the potential dangers of *parens patriae* and fluid class suits in circumstances where the equities fail to match the preconceived notions of the proponents of these procedural devices. Here we are generally dealing with small individual businessmen and practitioners, not giant corporations. We are likewise not dealing with hardened price-fixers; in many cases the legality of the codes of ethics and fee schedules in question was generally presumed to be lawful even by lawyers until the Supreme Court ruled otherwise just last term. Finally, it is highly unlikely that any of these groups of defendants have amassed collective "pots of gold" by gouging consumers; to the contrary, as one court noted in approving the settlement of a class action against certain realtors in Alabama that provided for no damage recovery at all, in each and every case where real estate brokerage fee schedules have been enjoined, the effect has been to *increase* rather than *lower* rates.

Nevertheless, real estate brokers in particular have recently been subjected to a number of class suits asserting astronomical treble damage claims which are particulary shocking in light of the smallness of the businesses involved in *Kline* v. *Caldwell Banker & Co.* (1974–2 TRADE CASES ¶ 75,436 (9th Cir. 1974), for example, the representatives of the alleged plaintiffs' class sought

to recover $750,000,000 against some 2,000 Los Angeles realtors (the vast majority of them being individuals in business for and by themselves) based upon the claimed use of a recommended fee schedule in some 400,000 sales of residential property.

While the proponents of the *parens patriae* bills may have in mind their application to cases of hard core antitrust violation by defendants that have unjustly enriched themselves at the public expense, there is nothing in the proposed legislation that so limits State suits or indeed even permits judicial control to avoid the very real danger of inequity—a danger which is apparent, not in some hypothetical situation, but in the kinds of cases that the Justice Department and private plaintiffs' bar are bringing right now.

Congressman Rodino, in a statement submitted to the Rules Committee, expressed the hope that the danger of imposing unconscionable liability on innocent businessmen for conduct reasonably thought to be lawful would be avoided by the provision in the bill limiting the availability of the *parens patriae* remedy to violations of Sections 1 and 2 of the Sherman Act. According to the Congressman's statement—and I quote, "There are, in fact, few if any areas of business activity where the application of Sections 1 and 2 of the Sherman Act is not clearly delineated by past decisions."

Unfortunately, this just isn't the case. The Los Angeles realtor suit I have just referred to was, in fact, predicated on Section 1 of the Sherman Act, the defendants' adherence to their association's fee schedule having been attacked as an alleged conspiracy in restraint of trade. The *Topco decision*, in which cooperative efforts by small grocers to compete with the larger chains were struck down because they imported an alleged assignment of exclusive territories was, again, a Section 1 case. Indeed, when, for some 25 years I reviewed in annual lectures to the New York City Bar each year's grist of antitrust opinions, I was constantly surprised by the Supreme Court's extension of Sections 1 and 2 of the Sherman Act to new areas of business conduct—extensions of the law which I surmise must have been at least equally surprising to the businessmen directly affected. Indeed, since it is difficult to imagine many Clayton Act violations that could not also be attacked under Sections 1 and 2 of the Sherman Act, this supposed limitation in the bill is in fact an almost totally meaningless "safeguard". Thus, Title IV and the companion Rodino bill as presently drafted are not limited to suits against the malefactors of great wealth based on hard core violations of undeniable illegality. Based on the cases brought by the Government having a maximum impact on consumers, they open the doors wide for the assertion of claims of astronomical proportions against small business and professional people for conduct whose legality very few questioned until recently. Does this Committee really want the doors so opened against so many of your constitutents?

The bulk of the price-fixing cases brought by the Government are concerned with conspiracies occurring in areas of the economy far removed from the consumer with the result that the price-fixed item is generally a miniscule element of the product or service that the consumer purchases. For example, many of these suits have involved items such as plumbing fixtures, gypsum wall board and plaster, gas vent pipe, plastic pipe fittings, concrete and concrete block, toilet seats and overhead garage doors which consumers typically acquire only as component parts of new or used homes. Similarly, the Department has charged price-fixing conspiracies affecting zipper sliders, which consumers ultimately acquire as a minute feature of the articles of clothing they purchase, and also with respect to the paper labels placed on bottles, cans and containers in which consumer products are marketed.

Even further removed from the consumers are the conspiracies charged by the Government affecting diamond grit used for industrial grinding, chromite sand used to make molds for steel ingots, nylon netting used for shrimp and salmon fishing, and chemicals used to make plastics and herbicides, all of which have only the most speculative connection with goods or services actually sold to consumers.

Outside the price-fixing area we encounter litigations involving tie-ins at the manufacturing level as, for example, the case where a defendant is charged with only allowing its grain elevator in a given port to be used if the shipping companies also used its stevedoring services in unloading their grain. Twenty Government suits involved territorial divisions, again at the production level, such as, for example, among producers of lithium or publishers of books. Similarly,

there have been 19 Government actions charging defendants with monopolization primarily at the manufacturing level. An example is the charge against the major networks with monopolizing prime time T.V. entertainment programs. Interestingly, in many instances the Department's Section 2 cases claimed that the defendants achieved monopoly through predatory pricing whose immediate effect would be beneficial rather than adverse to consumers, however harmful the impairment to competition that may eventually result over the long run. Another category of cases has been conspiracies by purchasers to buy at prices lower than those charged by the sellers. In the vast majority of these antitrust offenses, it is going to be highly unlikely, if not impossible, for consumers to make out compensable claims.

Against this background, to see what the actual effects of the *parens patriae* provisions of the bill are going to be, let us take the case cited in the House Committee Report of a hypothetical antitrust violation resulting in alleged overcharges of $50 million and claimed to affect 50 million consumers, so that each consumer has an asserted claim of one dollar. Based on our study of the Government's civil and criminal antitrust suits over the last five years, it is virtually certain that in any case even approaching this magnitude, consumers are likely to have acquired the price-fixed item only at the end of a long chain of distribution, after the item has been incorporated into something else as well as having been bought and sold in a multiplicity of intervening, competitive markets. Thus, aside from legal impediments, it is going to be virtually impossible as a matter of economic and practical fact for consumers to prove injury. To take a typical example, how is a customer who purchased a $30,000 house ever going to prove he would have paid $29,999 if the plastic pipe, wall board, gas vent pipe, plumbing fixtures or garage door in that house had originally been sold by the manufacturer to a wholesaler for one dollar less? How is he going to prove, first, that the price charged by the wholesaler to a subcontractor in an untainted, fully competitive market was artificially inflated by $1 rather than being determined by the forces of supply and demand, and then establish that the same was true with respect to the subsequent sales made by the subcontractor, the contractor or builder and any prior owners there may have been of the house itself? How is the consumer going to prove that, if there was an overcharge, it was he who paid it, rather than any of the equally innocent purchasers at prior levels in the chain of distribution, all of whom—based on past experience—are likely to be pressing claims in competition with one another based on the same alleged injury.

It is perfectly obvious that, however profitable this kind of litigation may be to the lawyers involved, no consumer is going to derive any meaningful benefit. What is more, there is nothing in the pending bill that would or (within the limits of the Constitution) could circumvent these problems. If a single consumer can't trace a $1 overcharge through the chain of distribution to himself, the task becomes no easier when multiplied by 50 million. There is no statistical or sampling method which can overcome the insuperable difficulty of proving that a $30,000 house would have cost a dollar less but for a price-fixing conspiracy affecting one of its innumerable component materials or accessories. There is no "estimating technique" by which a damage claim can be expropriated from a person higher in the chain of distribution who really did pay an overcharge for a material or part, but then sold his own product or service at the same price he would have obtained in any event under the prevailing economic conditions. In short, there is no magical, legislative solution to the problem of the consumer who does not have a viable, provable claim: 50 million times zero is still zero.

It is likewise clear that an attempt to circumvent the need to prove injury by basing damage recoveries on pure guesswork would constitute an unconstitutional deprivation of property without due process of law. Indeed, Judge Medina found that the fluid recovery device proposed in the *Eisen* case violated precisely that constitutional safeguard of due process which, of course, is equally applicable to legislative as well as judicial law-making.

Congressman Rodino states unequivocally, and I quote: "There is nothing in this bill that would change substantive antitrust law or the requirement that damages be proved under established legal standards. The State would not be able to collect a penny under the bill's procedures unless it proves (1) that there was an antitrust violation, (2) that the violation caused injury to consumers and (3) the amount of the resulting damages to consumers. The bill would let consumers (through their State Attorney General) prove their damages collectively, but they would still have to prove actual damages."

I accept Congressman Rodino at his word. Neither the *parens patriae* nor class action remedies, thus, are to be available unless the violation has caused injury to consumers. I take it, therefore, that in those of the recent suits where the result of the litigation was to increase prices to the consumer, there could be no recovery, since there has been no damage, regardless of whether the suit is brought by the consumer individually or collectively through *parens patriae* or consumer class actions. Where there are three to five stages between the level at which the violation occurs and the consumer purchase, we run into very difficult legal questions as to whether the consumer has any right of action at all and if he does how his claim is to be reconciled with and balanced against the conflicting claims of the intermediaries in the production and distribution chain between the stage at which the violation occurs and the stage at which the consumer makes his purchase. According to Congressman Rodino, if he has no damage, the *parens patriae* remedy is inapplicable. If the cases brought within the past five years are any criterion, *parens patriae* will, and properly so, provide no remedy.

All this does not, of course, mean that there is nothing that can be done to enforce the antitrust laws in the consumer interest. What it does mean, however, is that a putative consumer remedy which is based upon the false assumption that consumers are generally going to have compensable damage claims in antitrust cases is predestined to create disappointed expectations and frustrations on the part of the very people that the legislation is supposed to benefit. To be meaningful, a consumer remedy must take the economic facts of life into account and be designed accordingly to be workable in the real world of antitrust.

I have several suggestions for the Committee as to possible alternatives for accomplishing by far more effective means the laudable goals of the present, pending legislation.

First, I think we have to realize that our first priority—which *is* susceptible of realization—ought to be that of providing effective antitrust enforcement aimed at stopping those violations which are most likely to cause serious injury to consumers and the nation generally. That this is not necessarily the kind of enforcement that exists today is suggested by the fact that, as I have noted, very few Government prosecutions involve violations that affect consumers directly, and those that do—such as the real estate broker and professional fee schedule cases—are as often as not followed by increases rather than a lowering of consumer prices. All too often the Justice Department proceeds as though its primary function were to expand the technical, legal scope of antitrust to the maximum possible limit, concentrating on novel areas of application without apparent consideration of the economic consequences or the likelihood that less exotic but possibly more prevalent and harmful practices—such as price-fixing—present greater dangers to the public welfare. This approach is reflected *inter alia* in the Government's merger cases, which have tended to involve smaller and smaller companies and increasingly attenuated theories as to the impairment of potential competition—which have moved, in other words, into precisely those areas where the economic effects of a Government lawsuit are most uncertain.

The problem we face in this regard to perhaps epitomized by the *Topeo* case I referred to earlier. There, although the program which the small grocers pursued through their cooperative necessarily involved the assignment of exclusive territories, they made out an impressive case that the net effect was to permit them to vie for business with the larger supermarket chains and thus bring more, rather than less competition to consumers. The Supreme Court, in striking down the defendant's horizontal territorial allocations as illegal *per se*, stressed the point that it would go beyond the judicial function and competence to weigh the defendants' claims of enhanced inter-brand competition against the fact of decreased intra-brand competition. Assuming that this is so, shouldn't there be at least *someone* to make a determination as to whether a Government victory is going to be good for consumers, competition and the nation generally? And if the courts are not going to do that job, then shouldn't at least the Government itself make such a determination in a controlled, principled manner calculated to ensure reasoned consideration of all pertinent public interest considerations?

In sum, the effectiveness of antitrust enforcement in the consumer interest needs to be improved in a number of areas. For one thing, the Justice Department's efforts should be channelled toward bringing those suits likely to have the most significant economic effect in terms of promoting the proper functioning of the competitive system. This might be achieved, *inter alia*, by requiring the Department, like other federal agencies, to issue reasoned statements explaining

its major policy decisions, such as its decisions to bring lawsuits of various types, setting forth in such cases the extent and nature of the impact on the economy which a Government victory is expected to have.

A second goal to which Justice Department enforcement efforts should be guided is the protection of the consumer as such. Thus, the detection and prosecution of violations that directly affect consumers should be encouraged and, to the extent necessary, funds should be especially appropriated for that purpose. In addition, the U.S. Attorneys in the various judicial districts should be authorized to maintain continuous grand jury investigations of price-fixing and other serious antitrust violations which have the most demonstrable direct ad adverse effects on the consuming public, and the present activitiese of the Antitrust Division in monitoring prices in various key areas of the economy should be further expanded as an important early warning system for price-fixing and like violations.

The enforcement policies of the Antitrust Division should also reflect the fact that in cases where the numbers of persons injured are so large and the amounts of individual damage are so small that private suits are unlikely to be maintained (*e.g.*, the hypothetical case cited in the House Report of 50 million persons each with a $1 claim), it is the Government that consumers must necessarily depend upon to protect their interests. Since there is no feasible way in which these small recoveries, after absorption of administration costs, will have any meaningful benefit to consumers, rather than to provide windfalls to the states, we should concentrate on preventing consumer injury through vigilant and effective antitrust enforcement, especially suits for injunctive relief.

In order to ensure that the consumer interest is adequately reflected in Justice Department policy making, several possible devices come to mind. One is to appoint advisors to both the Department of Justice and the Federal Trade Commission who are specially qualified to point out areas of consumer interest and to influence the choice of cases to be brought so as to maximize benefits to consumers. Another possibility is to require the Department to prepare a consumer impact statement setting forth an analysis of the likely economic impact on consumers of the Department's enforcement efforts.

Similarly, in those cases where treble damages might provide a realistic and meaningful remedy for consumers but where for one reason or another it is impractical for consumers to maintain the litigation themselves, I think that it is the federal antitrust enforcement agencies who should be responsible for protecting the consumer interest. Thus, I would recommend special legislation to allow the Attorney General of the United States to sue under Rule 23 of the Federal Rules of Civil Procedure as a statutory class representative on behalf of consumers in those cases where he finds that the consumers' claims are significant enough to justify the burden which the suit would impose on the judicial system. In such an action, the court should be empowered to determine not only whether or not there was an antitrust violation, but also the nature and extent, if any, of the injury to consumers resulting from the defendants' conduct. The court could then, as part of its judgment, lay down rules governing the measurement of consumer damages where the consumer has supplied cognizable injury.

At that point, the adjudication of individual consumer claims should pass from the courts to administrative body, such as the Federal Trade Commission. The agency should be empowered to award treble damages in such cases to individual consumers who comply with whatever simplified procedures the agency prescribes within congressionally mandated guidelines. The procedure should be sufficiently simple, however, so that a layman could prosecute his own individual claim before the agency without having to retain an attorney. Thus, consumers whose claims are not sufficiently meaningful to make it worth their while to comply with even such minimal requirements would, of course, receive no recovery. Those consumers whose claims were signficant would receive their entire treble damage recoveries without deduction for attorneys' fees or for the large costs of administration which typically erode individual claims in a normal class action context.

There are a number of advantages which I believe would accrue from this suggested procedure. For one thing, as I have indicated, the beneficiaries of such a litigation would be the consumers who are actually injured rather than the lawyers who all too often are the only ones who profit from a class suit. Secondly, responsible representation for the class would be assured, thus avoiding abuses—such as settlements exacted through blackmail—which have unfortunately become associated with other consumer class action procedures. Similarly,

by putting such representation in the hands of the Government, the Congress would avoid encouraging a coterie of plaintiffs' lawyers from formenting consumer class litigation for the purpose of generating gigantic legal fees, without regard to the interests of the consumers themselves. Since the Justice Department has developed the facts of violation in its own litigation, it is in the best position to take the next step of suing on behalf of consumers. This avoids the necessity of bringing the State Attorneys General into the act together with the private attorneys they hire on a contingent basis. Our plan avoids the expropriation of the interests of those who do not file claims and eliminates the anomaly of the states reaping a bonanza from a violation of federal law. Recovery would and should be limited to those who file a claim with the Commission. One has the right of not pressing a claim if he is so minded and there is no constitutional basis of granting his recovery without his consent to another even if the other is a sovereign state. Finally, the procedure I suggest would assure consumers of skilled, adequately financed representation in every meritorious case where a treble damage remedy is appropriate.

I now turn to several other aspects of S. 1284 which cause me deep concern. I turn first to § 701(c) which amends § 6 of the Sherman Act.[2] That section provided for the condemnation of any property involved in an antitrust violation which happened to be in the course of transportation from one state to another or to a foreign country. This Sherman Law remedy has proved to be a dead letter for two reasons; first, because it is much too drastic and is inherently unfair, and second, because the forfeiture is limited to property moving in interstate commerce in the implementation of an antitrust violation. Section 701(c) of the pending bill would eliminate the limiting language of § 6 concerning the movement of the goods in interstate or foreign commerce in carrying out any unlawful contract, combination or conspiracy.

The result of the proposed amendment is quite extraordinary. Now every piece of property embraced by any unlawful contract, combination or conspiracy is to be forfeited to the Government. Such condemnation is mandatory and not discretionary with the court. This means, for example, where a merger is challenged under the Sherman Act, the properties of buyer and seller are forfeited if the acquisition is declared unlawful. In price-fixing cases, the products whose prices are conspiratorially rigged, be they electrical equipment, plumbing fixtures, steel, sugar, or other commodities, become the property of the U.S. after judgment of illegality is entered. In a case such as *United Shoe Machinery*, all machines subject to the unlawful leases would likewise be forfeited. I could go on *ad infinitum*.

I can only ask whether the members of this Committee seriously intend to impose so draconian a penalty on American business whenever the Sherman Act is infringed. Has the Committee given consideration to the fact that in cases involving the same degree of culpability one defendant may have $100,000 of property condemned whereas another could be faced with the forfeiture of billions of dollars? So far as I am able to determine, the prior hearings failed to indicate the whys and wherefores for this radical change. What proof has there been of any need for the amendment? Who is sponsoring it? Has the Department of Justice, which would be responsible for bringing condemnation suits under § 701(c), requested Congress to confer such power and impose such responsibility upon it? Has this provision of the bill been approved by the Office of Management and Budget? These are questions which I believe the Committee should pursue and the answers to which the public is entitled to have.

Section 703 provides that a party's complaint may be dismissed or its answer stricken if it, or any person in privity with it, fails to furnish discovery on the ground that the law of a foreign country where the evidence is located prohibits compliance with the discovery order. Can you imagine the consternation in this country were any foreign country to enact reciprocal legislation which would compel an American to violate our laws in order that his pleadings not be automatically stricken and judgment entered against him by a foreign court? This is a problem that has been handled extremely well, on a pragmatic basis, by our federal courts, without creating any international incidents or complicating

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[2] SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States countrary to law.

the conduct of our foreign relations. There is very little meaningful testimony in the legislative hearings on the need, purpose or effect of this proposal. If it is not intended to change existing law, it serves no purpose, and if conversely, it is intended to restrict the discretion of the courts and to change the present law, no showing has been made of any need for taking any step which could have unpleasant repercussions in our relations with other nations.

The mischief of § 703 is compounded by § 707(c) which provides that 703 shall apply to all actions pending on the date of enactment of this bill.

I again would urge that the Committee find out who has sponsored this section, what are the reasons that Congress is being asked to enact it, what need has been demonstrated for any change in the law and what showing has been made, contrary to my representation, that the existing law has not worked satisfactorily in the interests of the litigants, the public and the administration of justice.

Section 603(c) provides that any antitrust plaintiff may have access to the grand jury documents and transcripts in any completed proceeding instituted by the United States. Manifestly, the purpose of this provision is to facilitate the prosecution of treble damage suits. The price the nation is called upon to pay for easing the burden of such plaintiffs is the abandonment of the secrecy of grand jury proceedings, a secrecy that heretofore has been zealously safeguarded by the courts and which can be pierced only under special and exigent circumstances. Under 603(c) the grand jury's proceedings are opened to the plaintiffs upon their request. The fact that the court may impose conditions upon the grant of access or require protective orders does not touch the jugular issue as to whether grand jury secrecy should be preserved.

I have had no experience in the enforcement and administration of the criminal law. I leave it to the Federal and State Attorneys General, past and present, as well as the various District Attorneys, again both Federal and State, to advise the Committee whether it is still in the public interest to preserve grand jury secrecy. The Committee will bear in mind that antitrust is not the only field where private civil actions are or can be brought. Where a defendant can respond to damage, the victims of robbery, theft or crimes of violence have private rights of action under established law. If grand jury secrecy is to be abandoned in the case of antitrust private actions, is there any reason why the same principle should not apply across the board? The informer plays a significant role in the administration of criminal justice. The information he supplies in normally held confidential, as otherwise he would not talk. Is it likely that there will be free disclosure of antitrust skulduggery to the Justice Department and to the grand jury if the witness, on whom the Government is relying to break the case, knows that after the Government litigation is completed, the world will learn that he played an instrumental role in uncovering the antitrust violation and bringing the defendants to book? Not being an expert, I raise the questions and do not have the hardihood to provide any answers.

Frankly, I am not familiar with every word of testimony the Committee has heard in its various hearings. Has the Attorney General of the United States given his approval to § 603? Has the Committee been given any analysis by the Department as to the effect of breaching grand jury secrecy? Does this section have the approval of the Administration?

Although I am not a criminal law expert, I do have vast experience in the trial of civil antitrust suits, not only in defense of defendants but in the prosecution of the rights of plaintiffs. I was plaintiff's counsel in probably the largest antitrust litigation that the federal courts have ever known, namely the actions by the various utilities against the electrical manufacturers. I unqualifiedly assert that § 603 is not needed by any experienced antitrust lawyer. The Federal Rules of Discovery will enable a plaintiff to obtain, after the conclusion af the Government's suit, whatever relevant and material evidence he may require. All that he needs is knowledge, experience and skill. Those who want the assistance of § 603 are confessing to their own ineptitude and indolence. Section 603 is not needed.

Section 701(a) and (b) expands the jurisdictional ambit of §§ 2, 3 and 7 of the Clayton Act, extending the federal jurisdiction over local price discriminations and acquisitions which are *not* in interstate commerce but which may affect it. There was good reason in extending the power of the Federal Trade Commission in regard to unfair acts and practices to activities affecting interstate commerce, as the decision of the Supreme Court in the *Bunte* case had seriously hampered the Commission in the discharge of its responsibilities. The

situation is quite different with local price discrimnatons and acquisitions. I would presume that if this world of ours was operated with logic and common sense we would say to the State Attorneys General, "Why don't you invoke your laws against local price discriminations and acquisitions which are injurious to competition while we, the federal government, concentrate, as we have in the past, with those violations of the Clayton Act that are of national dimension." Wouldn't that be a better use of the manpower the states can provide in the vital cause of bringing about local and national antitrust compliance than to confer upon them the questionable power under the Constitution of enforcing federal laws? Moreover, if we're really serious about protecting the consumer, must we not recognize that most injuries to the consumer occur on a local level in day to day purchasing from local merchants. Wouldn't it be a great day in the history of this country if we purged all retail trades of unlawful contracts, combinations and conspiracies in restraint of trade?

To be sure, many of the local conspiracies spill over across State lines and thus warrant federal attention. It is for this reason that we urge that there be federal grand juries in constant session to monitor the pricing and marketing activities at the levels which most directly affect consumers. These grand juries should be in the charge of the local U.S. Attorneys, thus adding their manpower to that which the Justice Department presently has both in Washington and its regional offices. Cooperation between the State and Federal enforcement authorities in a concerted campaign to rid our society of collusive restraints at the retail level would represent, in my opinion, a giant step forward in consumer protection.

I next turn to § 702, providing for the appointment of special masters, economic experts and other personnel in all civil antitrust litigation, private or public. As I read § 21(b), the bill goes beyond providing the court with assistance; it puts the court in the position through its special masters, experts and other personnel, to take over the conduct of the case itself, contrary to the traditions of the adversary system. I find it quite extraordinary that the court's special masters, economic experts and other personnel may also serve as expert witnesses and may provide additional evidence subject to objection by any party. Let us not forget that this new procedure can be a two-edged sword. Some judges being plaintiff-oriented may appoint personnel who by inclination and background would be disposed towards the plaintiff's side of the controversy. *Per contra*, a judge with more conservative instincts and whose sympathies might be more directed towards the business community than to aggrieved suitors, might tilt the balance through his appointments. Then, of course, there are those judges who will make a strenuous effort to appoint those who are completely neutral and objective.

Who is better informed about a case than the experienced counsel selected by the parties? Whether I represented plaintiffs or defendants, I most certainly would not want the intrusion and interference by court-appointed personnel. I want my case tried by a federal judge and not by a special master. This only adds an additional step as each party will inevitably appeal every ruling of the special master to the District Judge. I've never found that a multiplicity of cooks either makes a good broth or expedites anything. I shudder to think of the shambles into which an antitrust trial will be converted by § 21(b). I would like to know and I think the public is entitled to be informed as to who has asked for this revolutionary change. Is this the desire of the Department of Justice? Has there been a demand for the change from the antitrust bar? Or is this the brainchild of some academic and theoretical mind uncontaminated by any practical experience? Don't you believe the bench and bar should be polled before the adversary system is abandoned in antitrust litigation? This section by itself warrants weeks of hearings.

I shall be very brief in my remarks about Title II. It's hard to discuss that title without indulging in pejoratives. The last thing that I would expect of a Congress after Watergate would be the enactment of legislation permitting executive investigations of parties and prospective witnesses by the attorneys in the Department of Justice. If lawyers prosecuting antitrust cases are entitled to such power, what about the other divisions of the Department of Justice? Could you gentlemen really sleep at night if every branch of the Department of Justice were to possess the inquisitorial powers which Title II confers upon the antitrust division? Just imagine how those with the Watergate mentality could have abused such authority on the theory that they were investigating matters

falling within the jurisdiction of the various divisions of the Department. Bear in mind that the Title permits the grant of immunity where the witness invokes the Fifth Amendment. I cannot understand how any believer in civil liberty could support this Title in its present form.

I do not quarrel with the idea that the Justice Department be empowered to conduct pre-trial investigation under proper safeguards. Let the interrogation of witnesses take place before magistrates specially appointed for this purpose, who will rule on objections and protect the witness from over-zealous prosecutorial persistence. The subject matter of the inquiry should be spelled out in meaningful detail so that the magistrates can properly rule on objections of relevance and materially. The targets of the inquiry should be present and permitted to cross-examine. The investigations should be strictly limited to actual or possible antitrust violations which the Department intends, if the evidence warrants, to proceed against in civil suits.

As to investigations relating to the Department's participation before administrative bodies, it would seem to me that the Department, like everyone else, should conform to the rules, regulations and procedures of such agencies in respect to pre-complaint investigations. I see no reason why the Department should be placed in any special position. If the procedures of any agency are deficient in respect of pretrial investigation, let us deal directly and specifically with those procedures so that any changes will redound to everyone's benefit and not merely to the Justice Department.

I was very pleased to learn that Senator Hruska has written the Chief Justice to inquire as to the judicial impact of S. 1284. With all respect, I believe that the Committee itself should appraise the impact of its legislation upon the federal courts. Through the *parens patriae* and consumer class action remedies, you are manifestly imposing new burdens on the courts which in practice can prove to be extremely heavy. If the declaration of policy has any substantive effect, you are inviting a mass of new suits against the major corporations of the country on a new theory of liability. Endowing the Department with subpoena power will inevitably result in a welter of litigation in the federal courts on the scope of the subpoena, the propriety of the questions being put to the witnesses, proceedings against recalcitrant witnesses, the granting of immunity and the like. Title VII, the Miscellaneous Amendments, likewise improve new responsibilities upon the courts.

I am in no position to quantify the number of litigations which will be triggered by the new act but it would appear to me that it would be substantial. According to Chief Justice Burger's year-end report, each United States District Judge is currently responsible for an average of 402 cases. The number grows larger each year. In 1970 the comparable number was 317. It is believed that the average number of cases per judge will increase to 450 by the end of the present judicial year. On a fifty-week work year this means an average of nine cases to be handled per week. The load of Court of Appeals judges runs about 600 per judgeship. New responsibilities are constantly being piled upon our judges. Precedence by Congressional directive is to be given to trials of criminal cases. Each new piece of legislation triggers a new volume of litigation. Where are the judges to get the time to cope with the added responsibilities which S. 1284 will place upon them?

In a *parens patriae* suit the judge not only must determine whether there is liability to the persons on whose behalf the suit is brought but whether they have been injured and the amount of the damage award. In addition, there is the time that must be spent in administering the distribution of the award and the fixing of counsel fees. We know from experience how burdensome are class actions and we must not overlook that Title IV authorizes consumer class actions as well as *parens patriae* suits.

At the very least if this type of legislation is to be developed by Congress, even with all of the omissions and changes that I have recommended, there should be immediate enactment of the judge's bill to add to the nation's stock of judicial manpower. My own judgment is that the courts cannot cope with their present workload without a much greater expansion of our judicial roster. The enlargement of the judiciary will require the construction of new courthouses and a substantial increase in supporting personnel.

I should like to conclude by expressing the view that this is one of the most far-reaching pieces of legislation facing the present Congress, and perhaps one of the most important measures that the Congress has had to consider in recent years. I find that the legislation is replete with strange and unexpected provisions

which are not apparent on a first reading. We ought not rush to get this lengthy and complex measure before the Senate without the most careful consideration of each and every one of its sections and titles. There is too much at stake for us to proceed before all of us understand the whys, wherefores and origins of each of the reforms the bill would inaugurate. The public is entitled to no less.

The country is slowly emerging from the most serious recession in the post-war period. Our people are beginning to regain their equilibrium after the disillusionments of Vietnam and Watergate. Confidence of the American people in their institutions is at an all-time low but the erosion seems to have been halted and a renascense of the nation's spirit seems under way. The problems confronting the country are immense in their complexity. Our cities are in a state of decay; unemployment is above a tolerable level; the extent of our annual deficits is alarming; our financial structure exhibits surprising weaknesses; we are a long distance from solving our energy problems; and our foreign affairs are in a state of disarray. One could go on and on in enumerating the problems, social, economic and political, that crowd down upon us. Yet there is no problem that we cannot solve if we remain united as a people and concert our intellectual and physical forces towards the formulation of constructive and rational solutions and the creation of the widest possible consensus in their support.

I ask the Committee—

Is it constructive and wise in this critical period to launch an all-out war against our major corporations in the guise of preventing and eliminating oligopoly?

Is it in the national interest to threaten business with the forfeiture of its assets in the event the antitrust laws are violated?

Is it conducive to good relations with our western allies to require their companies to violate their laws in order to satisfy the discovery demands of the litigants in our courts?

Is it promotive of effective law administration to shatter the secrecy that historically has enshrouded the processes of the Grand Jury?

Is it wise to throttle the merger process with restrictive procedures that violate our principles of fair play and justice?

Is it right, and consistent with the precepts of due process, to give retroactive application to drastic changes in the law, in effect imposing *ex post facto* penalties of astronomical dimension on our business units?

Can we safely ignore the mounting crisis of the federal courts by increasing their workload without a correlative increase in the number of judges and supporting personnel? What happens to our society if we add the last straw which breaks the camel's back and brings about a collapse of the judicial system?

Are the benefits of *parens patriae* and class actions to consumers worth the cost which we surely will have to pay for these devices? Are there not available more effective and less costly remedies for safeguarding the consumer's interest?

And finally, is S. 1284 the way to bring out national unity, to hasten the industrial convalescence from the ravages of the recession and to restore the health and well-being of our sorely troubled society?

I believe I have made clear how I would answer these questions. I would hope that my views may be of some help to you in your reviews of S. 1284 in the mark-up sessions scheduled for later this month. I would also hope that you would not treat business as an alien intruder in our society and that you would not saddle it with punitive and unquantifiable liabilities that will disable it from making the contributions to our economic recovery which are so vital to our very survival as a nation.

The Fallacy of Parens Patriae and Fluid Class Actions: A Suggested New Approach for Enforcing the Antitrust Laws To Protect the Consumer Interest

(By Milton Handler and Michael D. Blechman)

In recent years, there has developed a widespread assumption in many quarters that the best way to protect consumers under the antitrust laws is through novel procedural devices which would permit very large numbers of small claims to be asserted in massive lawsuits. This view has been reflected in proposals for *parens patriae* and fluid class actions which have been rejected by the courts, but

which are now being considered by the Congress as part of two pending antitrust bills of immense potential importance.

As we shall show, neither the history of the *parens patriae* and fluid class innovations nor a consideration as to how they will work in practice suggest that this approach is likely either to confer significant benefits on consumers or to provide workable deterrents for enforcing the antitrust laws in their interest. It would therefore seem that the time has come to consider alternative means for realizing these objectives. Thus, for example, if we separate the problem of deterrence from that of compensation, it is clear that there is a great deal that could and should be done to guide and improve the Government's enforcement efforts so as to ensure that they produce far more economic benefit for consumers and the nation generally than is the case today. The problem of compensation can then be dealt with on its own terms by providing vehicles for reparation in those cases where compensation is in fact meaningful to the consumers themselves.

THE SEARCH FOR A PROCEDURAL PANACEA

The effort to develop a procedural device for asserting small individual antitrust claims on behalf of massive groups of consumers had its initial impetus in the 1966 amendments to Rule 23. Prior to that time, a class action for treble damages was in effect a permissive joinder device which required affirmative action by any class member wishing to be represented in the lawsuit. By virtue of the 1966 amendments, however, each person within the category defined by the plaintiff in his complaint automatically became a member of a litigating class unless he took the steps required by law to "opt out." Thus, the consumer who had little or no financial stake in a lawsuit and who was therefore unlikely to take any action at all, would, for that very reason, be included in the class. Consequently, a plaintiff's counsel could seek to create very large classes with aggregate claims of astronomical dimension simply by drafting appropriate language in a pleading.

Although it is by no means clear that the draftsmen contemplated, much less intended the consequences of such results, these new possibilities under Rule 23 led to the commencement of suits on behalf of such prodigious alleged classes as one and one-half million purchasers of bread in Philadelphia, tens of millions of retail purchasers of gasoline in various states, 20–40 million buyers of General Motors automobiles, 40 million hotel customers, all homeowners in the entire country, all consumers of eggs in the United States and even all 200 million or more persons in the United States.

As a seeming procedural key for opening up the federal courts to millions of aggrieved consumers, the class action was hailed as "one of the most socially useful remedies in history." In point of fact, however, the reality never came close to matching the promise of this supposed panacea. In some instances it was found that the consumers had suffered no compensable injury. In other instances the courts denied maintenance of alleged classes where, among other defects, the sheer burden of processing millions of small claims through discovery and trial rendered the alleged class actions unmanageable. In no case did the consumer class action prove to be a viable vehicle for providing class members with a compensatory antitrust remedy in a litigation context.[1]

Where defendants chose to settle and created funds to satisfy all claimants, the class action device still generally failed to provide meaningful benefits to consumers. Typically, the amount allocable to each individual consumer claimant, which was small to begin with, tended to become miniscule as the costs of administration and notice as well as attorneys' fees were deducted. The lack of significance which the consumer claimants themselves attached to these minute monetary recoveries is shown by the fact that huge numbers of such class members did not even bother to claim the amounts awarded to them as part of class action settlements.

In an effort to meet some of these problems, State *parens patriae* suits were introduced to the antitrust landscape in the early 1970's. Actually, two distinct kinds of *parens patriae* claims were asserted under two quite different legal

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[1] As noted by Judge Medina in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973):

"So far as we are aware not a single one of these class actions including millions of indiscriminate and unidentifiable members has ever been brought to trial and decided on the merits."

theories. In the first category, the States sought to extend their historic powers to protect the interest of idiots, lunatics and other incompetents by purporting to sue on behalf of their consumer-citizens allegedly injured by a claimed antitrust violation. The purpose of this kind of action (as opposed to the class actions formerly brought by States on behalf of consumers) was to allow the States to keep for their own use any unclaimed damages that might be recovered on the consumers' behalf. Since this procedural innovation circumvented all of the safeguards of Rule 23, it not unsurprisingly received short shrift in the courts. However, just as the appointment of a guardian *ad litem* does not change the substantive rights of an incompetent party, this type of *parens patriae* could not in any event obviate the need to prove individual injury to each consumer on whose behalf suit was brought.

The States did, however, seek to achieve this latter objective by a second type of *parens patriae* which attempted to avoid the need for proving damages to individuals by relying instead on putative injury to the so-called general economy of the State itself. This second category of *parens patriae* was rejected by the Ninth Circuit in *Hawaii* v. *Standard Oil of California*, however, not only because it was legally unsound, but also on the ground that the "general economy" of a State is an "abstraction" which the Court doubted could be the subject of independent harm.[2] The Supreme Court affirmed, pointing out, among other things, that "[a] large and ultimately indeterminable part of the injury to the 'general economy' . . . is no more than a reflection of injuries to the 'business and property' of consumers. . . ."[3]

The final suggested judicial innovation for circumventing the problems of asserting treble damage claims based on supposed injuries to consumers was the "fluid class" device proposed by the plaintiff and accepted by the District Court in *Eisen* v. *Carlisle & Jacquelin*. That case involved an alleged class of some 6 million odd lot traders on the New York Stock Exchange who were estimated to have been overcharged an average of $1.30 per class member for brokerage services during the relevant period.[4] As might have been expected in view of the modest stakes involved from the point of view of each individual investor, "[n]o claimant in the six years of the progress of the action had shown any interest in Eisen's claim."[5]

The district court recognized that because of the large size of the class and the miniscule size of the individual claims, "the class action was hopelessly unmanageable." Accordingly, in order to obviate these problems, it adopted a "fluid recovery" procedure under which damages would be awarded in the aggregate to "the class as a whole." Those persons actually injured and wishing to file claims (which were expected to be "relatively few" in number[6]) were to be paid out of the fund created by the aggregate damage recovery. The remainder of the fund would be disbursed by reducing future odd-lot brokerage fees by some judicially set amount until the fund was depleted, *i.e.*, by, in effect, distributing the "excess" damage recovery to future odd-lot purchasers regardless of whether or not such persons had bought during the alleged conspiracy and therefore at least arguably suffered some injury.

The Second Circuit rejected this proposed innovation, not merely because of the violence it did to Rule 23, but also "as an unconstitutional violation of the requirement of due process of law."[7] On the other hand, if constitutional requirements were observed, the Court noted that the alleged class would be unmanageable and that the costs of processing individual claims would render the amounts payable to individual class members "so low as to be negligible."[8]

Having come to a dead end in the courts, the search for a procedure to vindicate small consumer claims in antitrust suits moved to the Congress, where there are presently pending substantially similar bills in both houses that would adopt

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[2] 431 F.2d at 1285.
[3] *See* 405 U.S. at 264.
[4] *See* 479 F.2d at 1010.
[5] *Id.*
[6] *Id.* at 1011.
[7] 479 F.2d at 1018.
[8] *Id.* at 1017. The Supreme Court upheld the Second Circuit's decision, but limited its discussion to the narrow ground of notice. In particular, the Court held that individual notice had to be sent to all class members who could be identified through reasonable efforts, and that the cost of such notice—estimated at $315,000—had to be borne by the plaintiff. Since Eisen's own financial stake in the lawsuit was at most $70, as a pratical matter this ruling presumably marked the end of the lawsuit as a class action.

through legislation the judicially-rejected devices of *parens patriae* and fluid class suits.

Such proposed legislation would, among other things, empower the attorney general of any State to bring suits for damages sustained by natural persons residing in such State. In addition, the Senate (but not the House) Bill would authorize treble damage suits for injuries to a State's "general economy," subject only to the proviso that the monetary relief for such supposed damage may not duplicate the recovery awarded the State for damages sustained by its individual citizens.

Both bills further provide in the case of *parens patriae* suits asserting the individual damage claims of State residents *and* in any class actions brought under the antitrust laws on behalf of natural persons, that "damages may be proved and assessed in the aggregate" using unspecified statistical, sampling and other estimating "methods." While the legislation does not indicate what is to happen in a class action context after such an "aggregate" damage fund is created, in the case of *parens patriae* suits the bills provide that, unless specified by State law, the court shall have discretion to dictate a method of distribution, subject only to the caveat that the purportedly injured natural persons on whose behalf suit was brought shall have a reasonable opportunity to secure their "appropriate portions" of the fund. Thus, the pending legislation would permit precisely the kind of "fluid recovery" procedure which the Second Circuit rejected as unconstitutional [9] in *Eisen*.[10]

The foregoing history suggests that the development of the fluid recovery and *parens patriae* devices has been predicated upon certain assumptions of questionable validity. The first of these is that the problems of proof of injury and manageability which rendered consumer class actions unworkable are mere technical difficulties that may be overcome by legal ingenuity. This view also underlies the current proposed legislation before Congress which seems to presume that judicial rejection of *parens patriae* and fluid classes has been based on precedential or doctrinal grounds that may be legislatively overruled.

In fact, however, as we have seen, only one branch of *parens patriae* provides even a potential vehicle for circumventing the need to prove individual injury; and that legal innovation was rejected by the courts largely because they questioned the economic meaningfulness of the notice of injury to a State's general economy on which it was based. The fluid recovery device, on the other hand, was rejected at least in part on constitutional grounds which presumably would apply equally to a corresponding legislative solution. Furthermore, on a practical level, this procedural innovation is of no possible utility where consumers as a group have suffered no compensable injury or where proof of aggregate injury to a class is impossible because, for example, conflicting claims of other plaintiffs in the chain of distribution must be adjudicated individually.

There is, however, also a second and perhaps much more important assumption underlying the development of *parens patriae* and fluid class suits which may explain the persistant conviction that, despite all problems, some means must be found to provide an effective consumer treble damage remedy: This is the conception that in any given case, the defendants have gouged the public and wrongfully extracting from consumers a "pot of gold" which now lies secreted in their corporate coffers. In such circumstances, it is assumed that justice requires that some way be found to get the consumer back his money; or, if that is impossible, to at least make the defendants disgorge their illegal profits and thereby deter others from engaging in the future in any similar violations.

In order to determine the extent to which these assumptions as to both practicalities and basic equities conform to reality, we must make some effort to determine how the proposed legislation will actually work in practice with respect to the kinds of antitrust violation that appear to be occurring in the economy today. In order to do this, we have taken the Commerce Clearing House

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[9] Indeed, the "fluid recovery" provisions of the proposed bills raise additional constitutional problems above and beyond those present in *Eisen*. For example, while engrafting some of the procedural features of a class action on the *parens patriae concept* (such as notice and the opportunity to "opt out"), the legislation fails to provide such basic due process safeguards as standards to ensure that there is a commonality of interest among the class of persons on whose behalf suit is brought and that subclasses of such persons with divergent interests are separately represented.

[10] The pending bills would also reverse the ruling of the Supreme Court in *Eisen* by permitting notice by publication in such a suit unless a court finds such notice to be "manifestly unjust." Sec. 4C(b)(1).

Reports for the past five years describing the 341 civil and criminal actions commenced during that time by the Department of Justice. We shall examine first the relatively small number of alleged price-fixing conspiracies directly affecting consumers, since these are the violations most likely to have caused consumers ascertainable money damages. As we shall show, the circumstances and likely impact of the proposed bills in such cases bear little resemblance to the stereotypes apparently envisioned by the proponents of the new legislation.

We shall then turn to the vast majority of cases where antitrust violations have occurred at levels in the chain of distribution so remote from consumers as to make it virtually impossible for them either individually or as a class to prove that they suffered any compensable injury at all, much less the amount of the their damages. Such cases are additionally complicated by the fact that multiple, conflicting claims are typically asserted by persons at different levels in the chain of distribution based on the same alleged overcharge. As we shall show, neither the *parens patriae* nor fluid recovery devices provide solutions to the very real problems of proof of injury and manageability presented by these cases; consequently, if enacted in its present form, the legislation now being considered by Congress is virtually certain to produce disappointed expectations and frustration on the part of those suposedly to be benefited.

Finally, we shall attempt to suggest some alternatives to massive treble damage suits which we believe will help to realize the objectives of the pending bills far more effectively and without the practical, economic and constitutional problems raised by *parens patriae* and fluid class actions.

PRICE-FIXING CASES DIRECTLY AFFECTING CONSUMERS

Very few of the horizontal price-fixing actions brought by the Department of Justice over the past five years have accused defendants of fixing the retail prices at which consumers actually bought goods or services. Passing the 4 of these suits alleging price-fixing affecting vending machines for cigarettes and soft drinks (where the small, unrecorded, cash purchases involved make it obviously impossible for many individual consumers to establish injury), we find that two of the Justice Department suits charged local price-fixing conspiracies affecting retail liquor sales in Clovis, New Mexico and Waco, Texas; two charged similarly local price-fixing conspiracies on shoes and women's clothing in Albuquerque and New York City, respectively; four involved allegedly fixed charges for automobile repair work; and one charged price-fixing on assembled tour packages for travelers.

The largest single category of retail price-fixing charged by the Government, however, has been in the area of alleged conspiracies based on fee schedules and codes of ethics adopted by various associations of professionals and realtors. No less than 15 of these suits have been brought against groups of lawyers, architects, engineers, accountants, anesthesiologists, veterinarians and (particularly) real estate brokers.

The fee schedule cases provide a dramatic example of the potential dangers of *parens patriae* and fluid class suits in circumstances where the equities fail to match the pre-conceived notions of the proponents of these procedural devices. Here we are generally dealing with small individual businessmen and practitioners, not giant corporations. We are likewise not dealing with hardened price-fixers; in many cases the legality of the codes of ethics and fee schedules in question was generally presumed even by lawyers until the Supreme Court ruled otherwise just last term. Finally, it is highly unlikely that any of these groups of defendants have amassed collective "pots of gold" by gouging consumers; to the contrary, as one court noted in approving the settlement of a class action against certain realtors in Alabama that provided for no damage recovery at all, in each and every case where real estate brokerage fee schedules have been enjoined, the effect has been to increase rather than lower rates.

Nevertheless, real estate brokers in particular have recently been subjected to a number of class suits asserting astronomical treble damage claims which are particularly shocking in light of the smallness of the business involved. In *Kline* v. *Caldwell Banker & Co.*,[11] for example, the representatives of the alleged plaintiffs' class sought to recover $750,000,000 against some 2,000 Los Angeles realtors (the vast majority of them being individuals in business for and by themselves) based upon the claimed use of a recommended fee schedule in some

[11] 1974-2 Trade Cases ¶ 75,436 (9th Cir. 1974).

400,000 sales of residential property. In rejecting this proposed class suit, the Ninth Circuit introduced "the notion of fairness to defendants" as a requirement of Rule 23.[12] Thus, in his concurrence, Judge Duniway pointed out that to allow a class action in the circumstances of the *Kline* case would be to create "an overwhelmingly costly and potent engine for the compulsion of settlements, whether just or unjust." Most brokers, he observed, are small businessmen who "cannot afford even to participate in such an action, much less to defend it effectively" and who therefore "will settle for whatever amount they can bargain for, and without regard as to whether they are really liable or not. . . ."

While it is doubtful that the draftsmen of the proposed *parens patriae* bills deliberately intended to revoke the "fairness" doctrine articulated in *Kline*, this may be what they have in effect done by eliminating many of the significant safeguards against injustice presently contained in Rule 23. Thus, for example, the Ninth Circuit's holding is predicated upon the requirement of F.R.Civ.P. 23(b)(3) that a class action be "superior to other available methods for the *fair* and efficient adjudication of the controversy." (emphasis added) Since no corresponding language is included in the proposed legislation now before Congress, "fairness" may not be a requirement in *parens patriae* suits unless imparted as a matter of constitutional requirement. Without a fairness requirement, the courts would not have the power to prevent abuse which the Ninth Circuit exercised in *Kline*.

In short, while the proponents of the *parens patriae* bills may have in mind their application to cases of hard core antitrust violation by defendants that have unjustly enriched themselves at the public expense, there is nothing in the proposed legislation that so limits State suits or indeed even permits judicial control to avoid the very real danger of inequity—a danger which is apparent, not in some hypothetical situation, but in the kinds of cases that the Justice Department and private plaintiffs' bar are bringing right now.

The question that perhaps Congress ought to be asking itself at this point is whether it really serves the interests of consumers and the nation generally for even the Department of Justice to be bringing these fee schedule cases, especially since the Department itself acknowledges that prices in "service businesses" have risen after each of its price-fixing suits. Without prejudging the issue in this particular area, it would seem that the least that is required are procedural safeguards of the kind that guide and control administrative conduct in other parts of government, to ensure rational decision-making in the consumer and national interest by the antitrust enforcement agencies. While we shall make some specific suggestions in this regard in the final section of this article, it may be observed here that this goal of policy coordination at the prosecutorial level becomes much more difficult to achieve to the extent that enforcement responsibilities are shifted to 50 State attorneys general by *parens patriae* legislation.[13] The fact is that the very granting to the States of the power to bring these compensatory suits for consumers is, by itself, sufficient to create immense pressures on State officials to sue in every case where their consumer-constituents may potentially have a claim.

Turning to the remaining types of price-fixing at the retail level that have been the targets of Government suits, the danger here is that the proposed use of *parens patriae* and fluid class remedies against the garages, liquor stores and tour coordinators who are generally the defendants in these cases may well be as inappropriate as trying to kill mosquitoes with an elephant gun, and equally unproductive. The businesses involved in most of these violations are, after all, sufficiently small so that the fines of up to $1 million provided for by present law are already more than sufficient to threaten economic extinction. What is more, most of the defendants allegedly involved in this kind of price-fixing seem to be in licensed businesses, a circumstance which gives the States a potent additional weapon for both deterring others and preventing recurrences of the offense by the same wrongdoer.

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[12] *Marks* v. *San Francisco Real Estate Board*, 1975 Trade Cases ¶ 60,182 (N.D. Cal. 1975) at p. 65,609.

[13] In addition to the policy and practical objections to such a shift, the Supreme Court's recent decision in *Buckley* v. *Valeo*, — U.S. —, 44 U.S.L.W. 4127, 4169 (Jan. 30, 1976) indicates that the pending *parens patriae* legislation probably violates Art. II, cl. 2, § 2 of the Constitution insofar as it purports to vest in the State attorneys a general responsibility and authority "for conducting civil litigation in the courts of the United States for vindicating *public* rights. . . ." This is entirely different from existing statutory provisions for treble damage actions under the antitrust laws which, like other private suits under federal law, require that the plaintiff must demonstrate injury to himself, and thus plainly involve the vindication of private, not public, rights.

In sum, there is no shortage of available deterrents to retail price-fixing. The real problem is not one of adding a new hydrogen bomb to our armory of punishments, but rather of improving our enforcement efforts so that potential price-fixers will know that detection and punishment for antitrust violations will be sure and swift.[14]

PRICE-FIXING CONSPIRACIES REMOTE FROM CONSUMERS IN THE CHAIN OF DISTRIBUTION—THE PROBLEMS OF PROVING PASS-ON

The overwhelming majority of price-fixing suits brought by the Department of Justice from 1971 to 1975 have alleged conspiracies in areas of the economy far removed from the consumer, with the result that the price-fixed item is generally a minuscule component of the product or service that the consumer purchases. For example, many of these suits have involved items such as plumbing fixtures, gypsum wall board and plaster, gas vent pipe, plastic pipe fittings, concrete and concrete block, toilet seats and overhead garage doors, which consumers typically acquire only as component parts of new or used houses. Similarly, the Department has charged price-fixing conspiracies affecting zipper sliders, which consumers ultimately acquire as a minute component of the articles of clothing they purchase, and with respect to the paper labels which are put on some bottles and cans and which are thus included as a minor incident to the food and beverages consumers purchase at the grocery or supermarket.

Even further removed from consumers are the conspiracies charged by the Government affecting, for example, diamond grit used for industrial grinding, chromite sand used to make molds for steel ingot, nylon netting used for shrimp and salmon fishing, and chemicals used to make plastics and herbicides, all of which have only the most speculative connection with goods or services actually sold to consumers. On the other hand, in another group of cases involving local price-fixing conspiracies by wholesalers of bread, dairy products, meat, eggs and produce, consumers do purchase the price-fixed items as such, but only after they have been bought and sold at one or more intervening, competitive levels in the chain of distribution.

The problem in all of these situations where the consumer does not deal directly with an alleged price-fixer is that he cannot establish a claim merely by proving that there has been an antitrust violation; rather, in order to show that he has been injured, the consumer must also demonstrate that there was an overcharge which reached him by being passed from one level to another in the chain of distribution.

The extreme (indeed, insuperable) difficulty of trying to prove the pass-on of an overcharge was articulated at length by Justice White in his now classic opinion in *Hanover Shoe*. The plaintiff in that case was a shoe company that claimed it had been overcharged as a result of the defendant's policy of only leasing, as opposed to selling, its shoe-manufacturing machinery, thereby raising the total cost to the user of the machinery in question. By way of defense, the defendant argued that the plaintiff had suffered no injury since it had "passed-on" any overcharge to its own customers by increasing the prices at which it sold shoes.

In rejecting this defense, the Court stressed the virtual impossibility of trying to establish a casual link between an overcharge incurred by a business in acquiring supplies or equipment and the pricing decisions of that company's executives in the different and presumably competitive market in which it sells. Justice White noted:

> Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. (At 492–93).

Indeed, even in the best possible circumstances, where, by hypothesis, "it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge," it would still be impossible to prove that the buyer's price increase represented the pass-on of that overcharge since:

> There would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued.

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[14] Some specific suggestions for such improvement are laid out in the final section of this article.

In short, in what the Supreme Court referred to as "the real economic world rather than an economist's hypothetical model," it is inherently impossible to reconstruct the subjective dynamics of a past pricing decision, much less determine what that decision would have been if a particular cost item had been less expensive.

The only exception to this general rule which Justice White recognized in his opinion was the case of preexisting cost-plus contracts and like arrangements where the impact of a single cost item on price can be determined with mathematical certainty without regard to competitive market conditions and without inquiry into the mental processes of individual businessmen seeking to evaluate the subtle play of economic forces.

Some two years later, the same "insuperable" evidentiary obstacles which had led Justice White to reject a claim of pass-on by way of defense were relied on by Judge Lord in dismissing the claims of an alleged homeowner class in the *Plumbing Fixtures* litigation.

The defendants-manufacturers in that case were charged with price fixing on tubs, toilets, sinks and similar items. In order to recover, however, a member of the homeowner class would have had to prove (i) that, because of the conspiracy, the plumbing fixtures that were ultimately installed in his house had been sold by a defendant to a wholesaler at a price that included an overcharge; (ii) that that wholesaler had sold the fixtures to a plumbing contractor at an inflated price that passed-on the overcharge; (iii) that the overcharge was again passed on in the bid for the combined package of labor and material that the plumbing contractor submitted to the builder; and (iv) that the price at which the builder sold the class member his home contained the same overcharge. Those homeowner claimants that had bought used rather than new homes would in addition have had to show that each time their houses changed hands the purchase price was inflated by the amount by which the defendant-manufacturer had orinigally overcharged the wholesaler for the plumbing fixtures.

A number of factors combined to make it apparent that the homeowners in the *Plumbing Fixtures* case could not possibly prove their claims. For one thing, unlike the situation in *Hanover Shoe*, they would have had to prove not one, but a whole, unbroken series of multiple pass-ons. Second, the plumbing fixtures which were actually involved in the alleged conspiracy were a very small part of the cost of the homeowner's houses. Thus, the maximum overcharge on the fixtures in a typical two bathroom house was estimated by the Court to be $10 to $20, whereas the total prices for the homes that the class members purchased ranged from $29,000 o $30,000. It struck the Court, understandably, as incredible that a builder or former owner would have sold a thirty thousand dollar house for $29,990 but for a $10 overcharge on plumbing fixtures at the manufacturer level.

Finally, the wholesaler, the plumbing contractor, the builder, and each successive owner of the structure sold in an untainted, highly competitive market, where price was largely a function of supply and demand. Thus, competition at each level in the chain of distribution served to insulate those further down line from the impact of an overcharge at the manufacturer level.

What is particularly significant about these considerations is that, far from being unique to *Plumbing Fixtures*, they would appear to apply equally to the gas vent pipe, concrete block, plastic pipe fittings, wall board, zipper slider, paper label and other alleged conspiracies charged in many recent Government suits involving the same or substantially similar chains of distribution, and, of course, *a fortiori* to the cases involving equipment and raw materials even more distantly removed from the level at which consumers purchase. Virtually all of the courts that have considered the matter agree that in such cases—which account for the overwhelming mass of price-fixing conspiracies as reflected in five years of Government suits—consumers cannot possibly establish compensable claims.

A more difficult problem is presented by those situations where consumers actually purchase the price-fixed item itself from an intervening seller. Thus, while several courts have found that the obstacles to proving pass-on discussed in *Hanover Shoe* likewise bar consumer suits against wholesalers of bread and eggs, the court in the *Boshes* case took the position that retail purchasers of General Motors automobiles might be able to prove injury resulting from price-fixing and monopolization at the manufacturer level because they bought the product in suit in the same form as the defendant sold it and not (like the homeowners in *Plumbing Fixtures*) "as a small component or derivative of something else."

The problem with relying on this fact as a dispositive circumstance is that it fails to deal with the basic reationale for *Hanover Shoe*, which is the inherent impossibility of reconstructing pricing decisions in a competitive market. Thus, the court noted in *Boshes* that the "retail automobile business is notorious for its haggling," that "buyers 'shop around' to get the best price" and that "[p]rices vary even among identical automobiles sold by different dealers." If, as the Supreme Court held, the difficulties of proving a pass-on are insuperable even where it can be shown that the first buyer "raised his price in response to, and in the amount of, the overcharge," it would surely seem to be at least equally unavailing to try to determine whether a particular dealer passed-on or absorbed an overcharge in the admittedly volatile and highly competitive retail automobile market. In short, so long as the consumer is insulated by a competitive intervening market, *Hanover Shoe* itself suggests no reasonable basis for distinguishing cases involving wholesale lettuce or milk from those dealing with alleged price-fixing by producers of concerte block or the paper labels on cans of food.

A number of courts and commentators, finding the disallowance of consumer claims to be an undesirable and overly harsh result, have criticized the application of *Hanover Shoe* in *Plumbing Fixtures* and like cases. The problem, however, is that none of these critics has adequately come to grips with the hard factual considerations upon which the rejection of allegations of pass-on has been based.

Thus, it has been said that Judge Lord's decision represented an overly "literal" application in favor of defendants of a principle established by the Supreme Court for the benefit of plaintiffs; and one recent opinion has even suggested that he should have instead interpreted *Hanover Shoe* in light of the "result orientation with which the Court has approached the whole area of private treble damage litigation." In other words, according to this school of thought, when Justice White referred to the difficulties of proving pass-on as "unsuperable," he really meant that they were unsuperable for defendants only, and that a way would be found to allow plaintiffs faced with the identical evidentiary problems to somehow prevail. Aside from the lack of confidence in the judicial process which the cynicism implicit in this view could well engender, it fails to take into account the solid factual basis upon which Justice White's analysis rests. Thus, the Court's statements as to the virtual impossibility of reconstructing the decision-making process by which Hanover priced its shoes were predicated upon observations as to what the Court itself characterized as the "real economic world," and those same factual conditions obviously had to apply to an effort by a consumer of shoes to disentangle precisely the same pricing decision (as well as subsequent pricing actions at the wholesaler and retailer level) in seeking to establish a claim.

In general, the cases which have refused to apply *Hanover Shoe* to bar consumer claims treat the entire issue as a question of standing. They accordingly reject the *Plumbing Fixtures* decision as an erroneous attempt to insert a requirement of privity into the law of standing, pointing out (correctly) that such a rule would be inconsistent with at least the target area test of standing adopted by some circuits. In point of fact, the disallowance of the homeowner's claims in *Plumbing Fixtures* had nothing more to do with standing than did the Supreme Court's refusal to recognize the pass-on defense in *Hanover Shoe*.[15] Instead, both decisions were based upon a realistic assessment of the evidentiary problem involved and the unlikelihood in point of fact that the pass-on or pass-ons in question could ever conceivably be proven to have actually occurred.

It is precisely such practical questions as to the possibilities and methods of proof that the cases which treat pass-on as an issue of standing neatly avoid. Thus, in the *Master Key* case, the Second Circuit suggested that the plaintiffs might be able to prove injury merely by establishing that there had been an overcharge and that they were consumers of the product in question, apparently not even considering the possibility that any overcharge might have in fact been absorbed in its entirety by persons at intervening levels in the claim of distribution. In the *Western Liquid Asphalt Cases* the Court ducked the issue of how

[15] The defendants in *Plumbing Fixtures* did not even claim that the homeowner plaintiffs lacked standing. This would have been a strictly legal defense which could have been (and generally is) raised by a motion to dismiss based on the pleadings. Instead, the defendants sought to establish through interrogatories that, as a factual matter, the homeowners could not possibly prove injury. When the plaintiffs failed to respond with meaningful answers, the Court imposed the sanction of assuming the relevant facts in defendants' favor, and ruled accordingly.

injury could in fact be proven by relying on the lower court supposed assumption that some portion of the alleged overcharge had been passed on the plaintiffs. In the *Carnival Bag Co.* case the court merely ruled that the issue of whether the plaintiffs could prove their claims was irrelevant to the defendants' motion to dismiss, which was denied on the ground that the plaintiffs were in the "target area" of the alleged volation and therefore had standing.

While the question of whether pass-on can in fact ever be proven in any of those cases thus lies in abeyance, the affidavits referred to in some of the opinions suggest that the Supreme Court's prognosis as to the futility of such an effort is likely to be borne out. Thus, for example, in the *Master Key* litigation, Judge Blumenfeld based his denial of the defendants' motion for summary judgment in part on an affidavit of the plaintiffs' economist stating that the buildhrs' hardware involved in that case was sold in a market characterized by inelastic demand. The court's opinion then quotes with approval the economist's conclusion that "[w]hen demand is very inelastic, increases in costs due to an overcharge will be passed on in full." Ironically, this is precisely the argument that was raised by the defendant in *Hanover Shoe* who maintained that there could be no injury "where [an] overcharge is imposed equally on all of a buyer's competitors and where the demand for the buyer's product *is so inelastic that the buyer and his competitors could all increase their prices by the amount of the cost increase without suffering a consequent decline in sales.*" (emphasis added)

Indeed, it was in response to this very claim that the Court made its much quoted statements as to the "insuperable difficulty" of recreating pricing decisions "in the real economic world rather than an economist's hypothetical model."

While one may sympathize with the reluctance of some courts to disallow consumer claims, it is clear that rulings which postpone decision on the pass-on issue confer no benefit on consumers if they merely afford them an opportunity to demonstrate in agonizing detail the futility of attempting to meet their burden of proof which the Supreme Court pointed out in detail in *Hanover Shoe.* If Justice White in *Hanover* and Judge Lord in *Plumbing Fixtures* were correct in their perception of the relevant facts—and thus far no court or commentator has demonstrated the contrary—then it must be accepted as a fact of economic life that the overwhelming mass of price-fixing conspiracies which occur at levels other than retail do not result in compensable injury to consumers. In view of this circumstance, the proposed *parens patriae* bills now before Congress are likewise likely to prove a cruel disappointment since the whole approach for protecting consumers which they embody is predicated on the erroneous assumption that consumers have viable treble damage claims in the case of at least a significant body of antitrust violations. Since, as we have seen, this is not likely to be true even with respect to most price-fixing cases, the *parens patriae* and class action innovations would seem calculated to raise expectations on the part of the public that cannot possibly be realized.

This conclusion is in no way altered by the provision in the pending bills allowing "damages [to] be proved and assessed in the aggregate on the basis of statistical or sampling methods, or such other reasonable method of estimation as the court in its discretion may permit, without separately proving the fact or amount of individual injury or damage. . . ."

If the problems of proving pass-on are insuperable on an individual basis, it is difficult to imagine how such difficulties could be overcome by aggregation, or what statistical, sampling or estimating methods would be conceivably relevant to such an endeavor. Surely, if there is more than one level of buyers and sellers in the chain of distribution, it could not be enough merely to show an overcharge by, for example the manufacturers, since the possibility (and, indeed, likelihood) that consumers were insulated from any overcharge by the operation of intervening competitive markets would make it impossible to infer that either the class as a whole or any of its members were injured.

Similarly, a mere showing that prices increased at the retail level or even at each of the other intervening levels of the chain of distribution would not be sufficient to prove pass-on. As the Supreme Court pointed out with respect to the much stronger hypothetical case in which it was assumed that the buyer raised his price in response to and in the amount of an overcharge, a pass-on still could not be proven because there still remained the "nearly insuperable difficulty" of demonstrating that that seller would not have raised his prices in any event. Obviously, expanding the same or some lesser proffer of proof to cover the

"aggregate" injury of an entire class would not serve to cure the defect Justice White perceived; indeed, in *Hanover Shoe* itself the defendant *was* trying to prove a pass-on on a class basis—*viz.* a pass-on by the plaintiff to its customers in general—and it was just such an attempted class-wide showing of pass-on based on economists' arguments and statistics that the Supreme Court rejected.

The problems of proving pass-on are likewise untouched by the provisions in the pending Senate bill for *parens patriae* suits for injuries "to the general economy of [a] State . . . as measured by any decrease in revenues or increase in expenditures . . . that may with reasonable probability be casually related to [an] antitrust violation . . ."

If the problems of proving pass-on make it impossible for the consumers in a State to establish that they have been overcharged as a result of an alleged price-fixing conspiracy, it is hard to imagine how the State itself could show an injury to its "general economy" because, for example, of a "decrease in revenues." Indeed, even if, contrary to *Hanover Shoe*, it could somehow be proven that a conspiracy to fix the prices of, say, plastic pipe or overhead garage doors had resulted in an overcharge to consumers who purchased houses, the result of that overcharge would be to increase rather than decrease State revenues by inflating, *inter alia* sales taxes, real estate transfer taxes and the income taxes of in-state sellers, all without any corresponding cut in the taxes paid by the hypothetically overcharged homeowners.

Similarly, it is difficult to conceive of any way in which a State could claim injury in its quasi-sovereign or *parens patriae* capacity because of increased expenditures resulting from a price-fixing conspiracy. If a supposed increased in a State's expenditures resulted from its own purchase of a structure containing a price-fixed item, then any claim the State might have would be in its proprietary capacity, not as *parens patriae* (*i.e.*, as a quasi-sovereign suing to protect the general welfare of its citizens), which means the State would be in the same position and would face the same problems as any private consumer-claimant, including, of course, the insuperable obstacles of proving pass-on. On the other hand, if the increase in State expenditures resulted from its payment of monies (such as increased welfare benefits) to certain overcharged consumers, then, by its nature, its claim would derive from the injuries actually incurred by those consumers and would therefore fall *a fortiori* where, because of the problems of proving pass-on, proof of injury to the consumers themselves could not be established.

In *Hawaii* v. *Standard Oil Co.*, the plaintiff was unable to articulate any precise theory or measure of damages by which the gasoline price-fixing conspiracy alleged in that case could be linked to an injury to the State's general economy; and it was that very inability to give concretion to the State's claim which made the Ninth Circuit skeptical that the generalized economic harm being relied upon in fact existed. If, as the foregoing analysis suggests, there is no real fact situation in which price-fixing conspiracies could conceivably lower a State's revenues or increase its governmental expenditures, then, as the Ninth Circuit surmised, there may be no such thing as compensable injury to a State's "general economy" in this critical context.[16] If this is true, then this supposed *parens patriae* remedy contained in the Senate Bill represents another promise to consumers which is incapable of fulfillment and which therefore may be looked back upon in future years as a harmful and misleading deception.

AVOIDING MULTIPLE RECOVERIES—THE PROBLEMS OF ADJUDICATING CONFLICTING CLAIMS ON A MASSIVE SCALE

There appears to be a consensus among all courts that have considered the matter that the problems of proving pass-on must be handled in such a way as to avoid duplicative recoveries for the same alleged overcharge. In other words, if proof of pass-on is treated as inherently impossible to purposes of defense, so that the plaintiff-manufacturer in *Hanover Shoe*, for example, is permitted to recover three times the over-charges actually incurred by it at the time of payment, without any reduction for possible subsequent pass-on, then a different rule cannot be invoked to allow all of the wholesalers, retailers and consumers who purchased Hanover's shoes to likewise each recover for three times the same over-charges. To expose a defendant to multiple recoveries in such circumstances

[16] As we shall show below, this is equally true in the case of other types of antitrust violations besides price-fixing.

would subject it to, not three-fold, but twelve-fold or more damages for a single violation. Indeed, the penalty would vary with the length of the chain of distribution (each new level adding another treble exposure), rather than the gravity of the offense, thus creating a singularly arbitrary engine for punishing or deterring violators; on the other hand, such multiple recoveries cannot be justified in terms of compensation since, by hypothesis, permitting all of the claimants to recover will allow some if not most to enjoy full or partial windfalls.

Accordingly, even those courts and commentators that treat pass-on as a question of standing recognize that something must be done to either avoid or solve the multiple recovery problem. Thus, for example, in the *Mastey Key* litigation, Judge Blumenfeld (relying on dictum to the same effect in *Boshes*) took the position that the possibility of double liability might be obviated by the doctrine of collateral estoppel. Under this theory, if an indirect purchaser (such as a consumer) established a claim by proving an unbroken series of pass-ons, the judgment in that case could be asserted by the defendant against all subsequent claimants higher up in the chain of distribution as conclusively establishing that they passed on any overcharge and therefore suffered no injury. In point of fact, this notion has no support in the law of collateral estoppel which permits findings of fact in one action to be used under certain circumstances in a subsequent lawsuit *only* as against a party to the first action who had a full and fair opportunity to litigate the factual issues in question. Thus, persons higher in the chain of distribution would *not* be bound by any prior ruling in another case that they had passed-on an overcharge; indeed, they no doubt could contest any such assertion by defendants with great success by relying on the controlling authority of *Hanover Shoe.*

Another device used by some courts to avoid dealing with the problem of multiple recoveries is to rely on the Statute of Limitations in situations where conflicting claimants are either already barred or, the court hopes, soon will be barred by their failure to file claims.[17] In fact, in the latter situation, while the court may ignore the issue for the time being, the assertion of conflicting claims must always be regarded as a very real possibility until the statute has actually run, since it is hardly unusual for class actions on behalf of large numbers of new claimants to be filed in the closing days of the limitations period. Furthermore, in most cases—particularly where large amounts of money are at stake—conflicting claims are asserted as a matter of course either in the same law suit or in separate actions consolidated at least initially for pre-trial proceedings, and the courts therefore must deal directly with the problems of preventing multiple recoveries.[18]

In such circumstances, those courts which have declined to follow *Hanover Shoe* and *Plumbing Fixtures* and which have proceeded instead on the assumption that the fact and amount of pass-on are susceptible to proof, have concluded that each overcharge must be divided up in accordance with what the interests of the conflicting claimants are proven to be. Thus, in the *Western Liquid Asphalt Cases*, for example, the Ninth Circuit ruled that damages had to be apportioned among the claimants at various levels in the chain, with intermediaries (such as contractors) recovering for those portions of an overcharge in fact absorbed by them and the ultimate consumers (there, public entities which had contracted for the repair or construction of roads) recovering for only that portion of the overcharge actually passed on through all prior levels.

Western Liquid Asphalt did not involve any class actions. In *City and County of Denver* v. *American Oil Co.*, however, the court, considering the same problem of allocating overcharges in the context of even a small alleged class of 126 public entities, recoiled at the prospect. It noted that in order to try to trace

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[17] In fact, the issue of whether or not conflicting claims are actually filed has little bearing on the task of determining how much of an alleged overcharge, if any, was passed on to consumers. Obviously, the claim of a consumer who in fact was not injured cannot be enhanced by the failure of the person who actually did absorb the overcharge and therefore was injured to bring suit himself. Thus, even if all persons in the chain are not before the court as litigants, many of them will still have to be brought into the discovery process and perhaps even the trial to determine whether there was in fact a pass-on to consumer claimants.

[18] Thus, in the *Plumbing Fixtures*, *Gas Vent Pipe* and *Plastic Pipe* cases, for example, class actions were asserted on behalf of wholesalers, sub-contractors, general contractors, owner-builders and various categories of end users, the various classes in question often being represented by the same plaintiffs and/or counsel in all three lawsuits. In the *Drug Cases* massive class actions were likewise brought by virtually all conceivable categories of claimants. In various of the wholesale bakery price-fixing cases, class actions have been asserted by both retailers and consumers.

an overcharge on even a simple paving job, the cost of the asphalt would have to be broken out of the bid and an inquiry made as to the precise manner and extent, if any, to which that cost influenced the price charged for the paving contract as a whole. The court noted that, while this would not be simple, "as compared to tracing the cost of asphalt into the cost of a 10-mile stretch of new highway blasted out of the Colorado mountains, the problem would be child's play." Thus, describing the ways in which proof of pass-on and injury would vary from claimant to claimant, the court concluded that "[t]o try this case as a class action might be an accountant's paradise, but it would be a court's purgatory."

Not unsurprisingly, in the *Boshes* case, where the alleged class consisted of 30–40 million persons instead of a mere 126, Judge Decker came to the like conclusion that the unavoidable need to determine in each instance whether a retailer had absorbed or passed-on a putative overcharge rendered the lawsuit hopelessly immanageable as a class action.

It is obvious that the *parens patriae* bills presently before Congress are calculated to increase dramatically the number of conflicting claims with which the courts will have to deal since they would invite the States to assert consumer claims in virtually all large antitrust litigations. Thus, for example, whereas only purchasers of zippers have thus far sued in the zipper slider case, if the proposed legislation becomes law, the states would presumably feel obligated to protect the "natural persons" residing within their borders who purchased zippers as part of clothing; and in those cases where only the owners of apartment houses have thus far asserted claims in competition with wholesalers, sub-contractors and general contractors on account of allegedly price-fixed items (such as plumbing fixtures) included in such structures, the States may well consider it their duty to try to vindicate the further conflicting claims of tenants.

The problem, however, is that unlike the present class action rule, the proposed *parens patriae* procedures would not allow courts the escape mechanism of declaring the class (or *parens patriae* suit) unmanageable. Thence, any court unlucky enough to be chosen as the forum for a State *parens patriae* action would have no option but to adjudicate the claims brought before it, however numerous and miniscule they might be. To get some idea as to what this would mean in practice, one might consider that, according to the House Committee Report, the new legislation is specifically intended to cover the kind of case in which it is claimed that 50 million consumers have each been damaged $1. Since a case of that magnitude is likely to arise only where the alleged violation is remote from consumers in the chain of distribution, so that competing claims by intervening purchasers are almost certain to be interposed, the court is going to have to find some way to adjudicate the rights of each of 50 million consumers, not only as against the defendants, but also as against conflicting classes of plaintiffs at other levels in the chain of distribution, each of which is likely to claim that, to the extent there was any illegal overcharge, it was they rather than the consumers who paid and absorbed it. Not only will this enterprise consume lifetimes of judicial energy, but the result will be meaningless for the consumers themselves since the expense of litigating, including attorneys' fees, will exceed their maximum possible recoveries.

It is possible that the draftsmen of the proposed bills may hope that these problems can be obviated by the suggested provisions in the legislation for proof of injury to a class "in the aggregate" based on statistical or sampling methods or some other "reasonable method of estimation." In fact, as we have shown, the problems of proving even the existence of a pass-on do not become any easier simply by shifting the focus from an individual to a class-wide basis, and this is true *a fortiori* if one proceeds on the assumption that pass-ons can be proven, so that the problem becomes one of determining as a factual matter what portion of each overcharge was borne by each of the various claimants at the different levels in the distribution chain. Certainly, "sampling or statistical methods" are useless in this area; to take the circumstances of the *Boshes* case, the mere fact that some percentage or even all of a group of retailers chosen as a sample testify convincingly that they absorbed any and all overcharges in their entirety is of little or no probative value with respect to some other retailer who may have sold a particular car at a higher price in entirely different economic circumstances. The fact is that in this area one is dealing not only with the rights of defendants, but also with the rights of other plaintiffs who are indisputably innocent parties and who may be the ones who actually did absorb the overcharges in question and who therefore really do

have the true claims; obviously, there is no constitutional way in which such persons can be deprived of their rights to treble damages on the basis of some "estimating method" which may amount to no more than a mere guess as to the extent (if any) to which they supposedly passed-on the putative overcharge.[19]

It is likewise clear that the problem of avoiding duplicative recoveries is complicated rather than aided by the provisions in the proposed Senate bill for *parens patriae* suits for damages to a State's "general economy." Such suits add another level to the problem of duplication since, as Justice Marshall noted in *Hawaii* v. *Standard Oil Co.*, a "large and ultimately indeterminable part" of any supposed injury to a State's "general economy" is in fact no more than a "reflection" of injuries to individual consumers. To meet this point, the Senate bill has added a proviso that a State not be awarded any damage recovery for injury to its general recovery which duplicates its recovery for injury to individual consumers. Aside from the failure of this provision to deal at all with the danger of duplication resulting from private suits,[20] the command it gives to the courts would appear to be inherently incapable of being carried out based upon Justice Marshall's observation in the *Hawaii* case itself that—

> Even the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State.

In sum, the proposed *parens patriae* bills would require the courts to deal with antitrust litigation on an unprecedented scale involving conflicts between competing claimants and possible duplication between different types of State *parens patriae* claims, all without any guidance as to how the multitude of ensuing problems are to be dealt with. Since these suits are likely to involve antitrust violations which in point of fact resulted in no compensable harm to consumers at all or where, at best, consumers will be pitted in a costly conflict with other claimants that is likely ot dissipate any meaningful recovery, one might well question—before the bills become law—whether the burdens to be thrust on the courts really have any social justification whatsoever and whether the kinds of lawsuits here being engendered are rationally calculated to serve the consumer interest.

OTHER TYPES OF ANTITRUST VIOLATION

Considering the remainder of the Department of Justice civil and criminal actions commenced during the 1971–1975 period, it is clear that the further one moves from price-fixing, with its generally ascertainable element of overcharge, the more difficult it becomes to prove that consumers have suffered any compensable injury at all and, consequently, the more irrelevant, large-scale treble damage actions, fluid recoveries and *parens patriae* become to any real effort at protecting consumers.

Thus, at least four of the cases brought by the Government during the period studied involved tie-ins, that is, the sale or licensing of one item on the condition that the purchaser also buy a second item. In each such instance, competitors foreclosed from selling the tied product clearly suffer compensable harm, but buyers can claim to be likewise injured only if they are forced either to buy something they don't want or to pay more for the tied product than would have been the case without the tie. While this leaves open the theo-

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[19] The Constitution of course likewise protects defendants against being deprived of their property without due process of law. Thus, while the existing rules as to proof of injury are extremely liberal (indeed, many people believe they are so loose as to be fundamentally unfair to defendants), any measure that would go even further by dispensing with the necessity of proving injury or allowing damage recoveries to be based on mere guesswork would undoubtedly run afoul of Fifth Amendment guarantees.

Thus, if despite our analysis, astronomical recoveries were allowed in *parens patriae* suits, by disregarding constitutional requirements and considerations of fairness, then the evils outlined in Mr. Rowe's testimony would take place to the harm of all and the benefit of none other than lawyers and the windfall recipients.

[20] For example, if the state does not bring a suit for injuries to individual consumers (or less likely, if it brings such a suit but a substantial number of consumers opt out), a private party could bring a class action on behalf of individual consumers that would duplicate in terms of the recovery sought the damages to the State's general economy that could be awarded in the State's own action. Similarly, the State's damages to its general economy may duplicate the claims not only of consumers but of others (corporations, for example) whose individual claims cannot be asserted by the State and who are therefore even more likely to bring their own class actions. Finally, nothing in the pending legislation deals at all with the problem of duplication resulting from claims being asserted by or on behalf of persons at different levels on the distribution chain.

retic possibility that consumers who are the direct targets of a tie-in might have viable treble damage claims, the record revealed by the Government prosecutions indicates that such tie-ins as actually occur in the economy are generally far removed from consumers in the chain of distribution. Thus, in one case, a defendant would only allow its grain elevator in a given port to be used if the shipping companies also used its stevedoring services in unloading their grain; in another case, several defendant copper companies were charged with licensing their patented plumbing system only to persons who agreed to build it with copper pipe. Clearly, it would be an insuperable task to try to show that the effects of such alleged violations actually penetrated through all of the intervening stages of the economy in order to cause individual consumers some quantifiable injury.

Some 20 Government suits during the past five years involved territorial divisions (including those resulting from restrictive licensing arrangements) and customer allocations. The likely effect of such violations on consumers varies from case to case. Thus, in *Topco* for example, the territorial division in suit allowed the defendant grocery stores to sell their own-brand products in competition with those of the large supermarket chains and thus probably increased competition at the consumer level, although the Supreme Court declined to consider this factor in light of its holding that territorial market division agreements are illegal *per se*. In general, horizontal market allocation schemes may reduce and distort competition, although in many cases it is very difficult to measure and quantify such injury in terms of money damages. Also, in the case of consumers, the problem of proving a compensable injury is aggravated by the fact that most of the cases brought by the Government in this area involve companies at the production level (*e.g.*, producers of lithium, publishers of books), so that once again, consumers are insulated from the effects of the violation by persons at several intervening steps in the chain of distribution each of whom presumably bought and sold in a competitive market. In sum, while, once again, it is theoretically possible that a market division conspiracy directly affecting consumers might be shown to produce ascertainable overcharges, none of the cases brought by the Justice Department during the past five years appears to fit in this category.

Another 19 Government civil and criminal actions charged various defendants with monopolization, attempted monopolization and conspiracies to monopolize. While some Section 2 violations—such as the monopolization of automobiles charged in *Boshes*—might be shown to have resulted in overcharges to consumers but for the insulating presence of intervening, competitive levels in distribution chain, in most of the Government actions the likelihood of showing any overcharge was further reduced by the nature of the alleged violation itself. Thus, for example, in several of these cases (such as those involving monopolization of mobile home transportation and airline routes), the alleged wrongdoing related to proceedings before an administrative agency which was empowered to grant certificates of convenience and necessity and regulate rates, and which therefore presumably protected consumers from any impact in the form of overcharges resulting from the alleged violations. In other cases, as, for example, when the major networks were charged with monopolizing prime time TV entertainment programs,, there was again no possible relationship between the alleged violation and any identifiable out-of-pocket loss to consumers. Indeed, many instances (*e.g.*, the Department's suits alleging monopolization of electronic components, replacement tires, milk, and wholesale books and magazines), an important means by which the defendant supposedly monopolized was through predatorily low prices and the offering of free additional benefits to customers, all of which ought to have had a beneficial rather than adverse immediate impact on consumers, however harmful the resulting impairment to competition might have eventually proved to be over the long run.

Another major category of violations charged in the Government antitrust actions have been those primarily related to the defendants' purchasing function. Thus, suits have been brought, *inter alia*, against various lumber companies charged with conspiracy to eliminate competition among themselves in the purchase of public timber, against firms charged with conspiracy to boycott a particular vendor and against many different defendants in a wide variety of industries charged with unlawful reciprocity, *i.e.*, with using their purchasing power to gain an unfair advantage in the sale of their products by buying from those suppliers who reciprocate by purchasing from them. All of these practices

distort competition to a greater or lesser degree and therefore arguably injure consumers in a generalized way; however, it is difficult to see how any of them would result in specific, quantifiable injury to consumers as such as opposed to the vendors and competitors who are often directly injured by such violations.

Finally, 56 Government suits during 1971–1975 have dealt with mergers. Turning first to those involving horizontal mergers between actual competitors, there is considerable doubt as to which, if any, of these actual or proposed acquisitions did or (if not enjoined prior to consummation) would have resulted in any harm whatsoever to consumers, compensatory or otherwise. Thus, in many cases following *Von's Grocery* and *Pabst*, mergers were attacked because they would have increased concentration in a given industry, even though the economic consequences of such increased concentration were at best highly speculative.[21] Even in the best of circumstances, however, where a clear violation of Section 7 of the Clayton Act can be made out, appraising the economic effects of a change in industry structure involves so many imponderables that there is no way to translate a tendency to lessen competition into a measurable, overall effect on price, much less show a specific impact on individual consumers. The impossibility of showing compensable harm to consumers in a merger context becomes even more obvious when we consider vertical acquisitions[22] and, *a fortiori*, product and geographical market extension acquisitions which involve at most the possible elimination of potential competition.

In sum, in the case of the vast majority of antitrust offenses, either problems of pass-on or the nature of the violation itself make it highly unlikely if not impossible for consumers to make out compensable claims. Consequently the treble damage action must be recognized as a generally inappropriate vehicle for protecting the consumer interest.

This fact is in no way altered by the provisions in the proposed bills with respect to proof of damages in the aggregate; just as the problems of proving pass-on do not magically disappear when the matter is treated on a class-wide basis, it is likewise no easier to show that consumers in general have been harmed by a particular reciprocal dealing arrangement or merger than to establish that fact on behalf of specific individuals. Again, as with proof of pass-on, there is no apparent way by which the suggested techniques of sampling, statistical methods and other supposed techniques of estimation can be used to obviate the hard fact that most infractions of the antitrust laws affect consumers only in a very indirect and often speculative manner.

Similarly, the proposed *parens patriae* suits for injuries to the "general economy" of a State provided for in the Senate bill would seem to be predicated on as unsound an economic basis with respect to other varieties of antitrust violation as is the case with price-fixing. During the hearings on the Senate bill, the question was raised—but never answered—as to how not only price-fixing and mergers, but a wide variety of offenses including territorial restraints, consignment agreements and price discrimination, could possibly result in proximate injury to the "general economy" of a State. If as the ensuing silence would suggest, there is no answer, then perhaps, like the Ninth Circuit in *Hawaii*, we should begin to question the existence of putative injuries to a State's "general economy" which this *parens patriae* remedy is supposed to vindicate.

The fact is that the only case which actually upheld a State's right to sue as parens patriae in an antitrust context—*Georgia* v. *Pennsylvania R.R.*—involved highly unusual circumstances which underscore the inappropriateness of trying to extend the notion of injury to a State's "general economy" to most normal antitrust situations. In particular, the charge in the *Georgia* case was that the defendant railroads had conspired to harm the plaintiff as a State by the imposition of discriminatory rates calculated to divert trade and commerce to other areas. Thus, the rate fixing conspiracy in that case took on the aspect of an embargo or boycott; that is, the kind of economic warfare against a sovereign which independent countries may react to by diplomatic or military

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[21] There is singular lack of consensus among economists as to whether concentration has any relation at all to profitability, which is often used an indicia of competitiveness. With respect to price, the effect of concentration is even more problematical; indeed, studies by both the Department of Justice and independent scholars indicate that over the past decade or more prices have actually risen less in concentrated than in non-concentrated industries.

[22] As recently noted by the Office of Policy Planning and Evaluation of the FPC: "The simple fact of the matter is that economic theory has nothing in it to suggest that vertical integration, either by contract or ownership, is in any general way likely to injure the interests of consumers." ATRR No. 692, E–11.

means and which therefore touches those quasi-sovereign interests that are the proper subject of a *parens patriae* suit.

Significantly, even in that peculiar context, Georgia was unable to prove that it had suffered any injury as a result of the alleged violation, and its *parens patriae* suit was accordingly dismissed following lengthy and ultimately futile proceedings before a special master. It is thus doubtful that there is any case in which an antitrust violation could be shown to result in the loss of revenues or increased expenditures contemplated by the pending Senate legislation. However, the fact is that very few antitrust violations import that element of discrimination against one State in favor of others that even suggests the possibility of harm to the State's "general economy" as a separate entity. Indeed, none of the cases brought by the Justice Department in the past five years would seem to fall in that category. Instead, most antitrust violations (like most frauds or even most embezzlements) involve essentially private wrongs, which may benefit some persons and harm others, but which have no ascertainable impact on the revenues or expenditures of the State as such. This is not to say that a State may not have a legitimate and very real interest in maintaining a law-abiding business environment, in protecting consumers and, perhaps most important, in safeguarding the unimpaired functioning of the market as an engine of efficient resource allocation and economic self-regulation. But these are not interests which are readily reducible to dollars and cents terms, and a proposed remedy predicated on the contrary assumption that the effect of antitrust violations can somehow be quantified as lost revenues or increased expenditures would therefore seem likely to prove frustrating and ineffectual.

A SUGGESTED NEW APPROACH

Recognition of the fact that in most antitrust contexts treble damage suits, fluid classes and *parens patriae* are likely to provide ineffective vehicles for helping consumers is, of course, only the beginning rather than the end of the inquiry as to how the antitrust laws ought to be enforced to protect the consumer interest. To take the example used in the House Report of a hypothetical antitrust violation claimed to have caused $50 million in damages to 50 million consumers, even though the task of proving a $1 overcharge to each consumer may be impossible, impractical and not especially meaningful to the consumers involved, it nevertheless *would* be possible, practical *and* meaningful if effective steps could be taken to prevent or halt the violation (and hundreds like it) before any injury was inflicted. It may seem that the observation that an ounce of prevention in this area is worth many pounds of cure is so obvious as to be hardly worth mentioning; yet the effort to protect consumers under the antitrust laws during recent years has been so one-sided in its emphasis on compensatory procedures that it may be well to remind ourselves that our logical first priority should be the detection, deterrence and suppression of unlawful behavior that significantly distorts competition to the detriment of consumers in particular and the nation in general.

To the extent Congress has addressed itself to the problem of the prevention of antitrust violations as such (that is, in terms other than as a hoped for, incidental consequence of the *in terrorem* effects of *parens patriae*, fluid classes and other supposedly compensatory procedures) all of the proposals it has adopted or considered have tended to fall into two categories: stiffer penalties and more money for the enforcement agencies. Thus, Congress has raised the maximum fine for Sherman Act offenses to $1 million for corporations and has likewise increased the possible jail penalty to three years. At the same time, Congress has vastly increased the Justice Department appropriation for antitrust enforcement, thereby making possible the hiring of more attorneys and staff and the commencement of more investigations, civil suits and criminal prosecutions.

Without in any way belittling the importance of these efforts, an examination of the cases actually brought by the Government in recent years suggests that what may be most needed at this point to improve antitrust enforcement in the consumer and national interest is not so much further additions to the already well-stocked armory of antitrust sanctions, or even further increases, without more, in appropriations, but rather the introduction of measures to ensure that the Antitrust Division uses its legal arsenal and resources in a manner reasonably calculated to produce the maximum economic benefit for consumers and the nation generally.

That this is not always the case under present practices is suggested by the fact, previously noted, that very few Government prosecutions involve violations that affect consumers directly, and those that do—such as the real estate broker and professional fee schedule cases—are as often as not followed by increases rather than a lowering of consumer prices. All too often the Justice Department proceeds as though its primary function were to expand the technical, legal scope of antitrust to the maximum possible limit, concentrating on novel areas of application without apparent consideration of the economic consequences or the likelihood that less exotic but possibly more prevalent and harmful practices—such as price-fixing—present greater dangers to the public welfare. This approach is reflected *inter alia* in the Government's merger cases, which have tended to involve smaller and smaller companies and increasingly attenuated theories as to the impairment of potential competition—which have moved, in other words, into precisely those areas where the economic effects of a Government lawsuit are more uncertain.

Similarly indicative of the Justice Department's apparent enforcement policies are the very large number of cases which have reached the appellate courts in recent years dealing with the application of antitrust to regulated industries. Here the Government typically expends precious resources fighting itself as the Antitrust Division and various regulatory agencies conduct what are essentially jurisdictional disputes in judicial forums. In several recent cases, the Supreme Court has rejected the extension of antitrust to a new area (such as stock exchange rules fixing brokerage commissions) because of the disruptive effect a contrary ruling would have on congressionally established regulatory procedures and the public interest goals they protect. Surely, it is worth considering whether a more open and disciplined decision-making process prior to suit might not have brought the Department to the same conclusion on its own—or at least to the view that the question was close enough to warrant an allocation of resources to the stamping out of more unambiguous evils.

The present need for procedures to ensure principled decision making at the prosecutorial level is heightened by the Supreme Court's increasing adoption of *per se* rules which keep the Court itself from considering the economic consequences of its rulings in the Government's favor. Thus, for example, in *United States* v. *Topco Associates, Inc.*, the defendants were small grocery and supermarket chains who joined together in a cooperative association to sell private label products in competition with those of the large national and regional supermarket chains. While Topco's program necessarily involved the assignment of exclusive territories to its members, the defendants made out an impressive case that the net effect was to permit them to vie for business with their larger supermarket competitors and thus bring more, rather than less competition to consumers. The Supreme Court, in striking down the defendant's horizontal territorial allocations as illegal *per se*, stressed the point that it would go beyond the judicial function and competence to weigh the defendant's claims of enhanced inter-brand competition. Assuming in light of the Court's opinion that this is so, shouldn't there be at least *someone* to make a determination as to whether a Government victory is going to be good for consumers, competition and the nation generally? And if the courts are not going to do that job, then shouldn't at least the Government itself make such a determination in a controlled, principled manner calculated to ensure reasoned consideration of all pertinent public interest considerations?

In sum, there would appear room for improvement to maximize the effectiveness of antitrust enforcement in a number of areas. For one thing, the Justice Department should be encouraged to bring suits calculated to have major favorable economic effects likely to benefit all groups (including consumers) interested in the proper functioning of the competitive system. Conversely, suits which lack such significance either because of the small size of the defendants, the limited, local nature of their offense, or the problematical economic consequences of the violation in question, should be discouraged. One way to achieve this result might be to require the Department to issue reasoned statements explaining its policy decision to bring lawsuits of various types and setting forth in particular the extent and nature of the impact on the economy which a Government victory is expected to have.[22]

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[22] Any law imposing such requirement would of course have to make it clear that the adequacy of the Department's statement could not be attacked by the defendants in the suit being brought. The beneficiaries of such a procedure would rather be the public at large, and the purpose of the statement would be to require the Department to demonstrate by articulating its reasoning processes that it had given at least a required minimum of consideration to the economic impact of its actions and to thereby allow persons both inside and outside Government a means of assessing the probable effectiveness of Department policies.

A second goal to which Justice Department enforcement efforts should be guided is the protection of the consumer as such. Thus, the detection and prosecution of violations that directly affect consumers should be encouraged and, to the extent necessary, funds should be especially appropriated for that purpose. In addition, the U.S. attorneys in the various judicial districts should be authorized to maintain continuous grand jury investigations of price-fixing and other serious antitrust violations which have the most demonstrable direct and adverse effects on the consuming public, and the present activities of the Antitrust Division in monitoring prices in various key areas of the economy should be further expanded as an important early warning system for price-fixing and like violations.

The enforcement policies of the Antitrust Division should also reflect the fact that in cases where the numbers of persons injured are so large and the amounts of individual damage are so small that private suits are unlikely to be maintained (e.g., the hypothetical in the House Report of 50 million persons each with a $1 claim), it is the Government that consumers must necessarily depend upon to protect their interests. Since there is no feasible way in which these small recoveries, after absorption of administration costs, will have any meaningful benefit to consumers, rather than to provide windfalls to the states, we should concentrate on preventing consumer injury through vigilant and effective antitrust enforcement, especially suits for injunctive relief.

In order to ensure that the consumer interest is adequately reflected in Justice Department policy making, several possible devices come to mind. One is to appoint advisors to both the Department of Justice and the Federal Trade Commission who are specially qualified to point out areas of consumer interest and to influence the choice of cases to be brought so as to maximize benefits to consumers. Another possibility is to require the Department to prepare a consumer impact setting forth an analysis of the likely economic impact on consumers of the Department's enforcement efforts. Such statements would not only indicate what portion of Government civil and criminal cases actually affect consumers in a material and beneficial way (and thus hopefully encourage the commencement of more actions which do have substantial, positive consumer impact); they would also require the identification and exposure to public scrutiny and criticism of cases which affect consumers negatively (*e.g.*, the realtors' fee schedule prosecutions which have tended to drive rates up) and thereby perhaps deter the bringing of cases that cannot be rationally defended on economic policy grounds.

One of the great developments in administrative law in recent years has been to increase both the effectiveness and the responsibility of the various federal agencies through any number of procedural innovations designed to require administrators to articulate the reasons for their decisions and to ensure that in exercising their administrative discretion due consideration has been given to legally mandated criteria.

While the function of the Justice Department is largely prosecutorial, and the discretion of prosecutors is particularly ingrained in our legal tradition, the fact of the matter is that the determinations made by the Antitrust Division as to what kinds of cases to bring also constitute an important aspect of our Government's economic policies. Hence, it is anomalous for such decision-making to be entirely immune from the requirement of open, reasoned consideration of legally imposed standards that is the hallmark of our administrative procedure in so many other areas. At the least, this potentially promising vehicle for improving the quality of antitrust enforcement for consumers deserves a good deal more of the attention and creative energy that is presently being squandered on the inherently futile effort to cure the incurable defects of *parens patriae* and fluid class suits.

Statement of Philip A. Lacovara*

I appreciate the opportunity to present my views to the Committee on Title IV of S. 1284 on behalf of Bristol-Myers Company. Title IV is meant to fill an apparent gap in the antitrust laws, whereby small individual injury occasioned by antitrust violations affecting consumers provides insufficient incentive for private treble-damage actions. Title IV proposes to plug this alleged gap in the device of a *parens patriae* suit, under which State attorneys general would be authorized to sue for treble damages on behalf of all natural persons residing within their States. But this is no solution, and indeed would create problems at least as severe as those which it is intended to remedy.

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*Partner, Hughes Hubbard & Reed, Washington, D.C.

A detailed examination of all the legal and technical problems of Title IV would consume many pages. Last June, my partner Jerome G. Shapiro testified before the Subcommittee on Antitrust and Monopoly, explaining in detail various legal and constitutional problems with Title IV. At this time I shall address only some of the fundamental misapprehensions which Title IV, if unaltered, would codify into bad law. The first is this: however unjust it is for consumers to suffer economic injury occasioned by antitrust violations—and indeed it is unjust—direct compensation to large consumer classes through court-awarded damage recoveries is a myth; it just does not happen. If the monetary stake of the individual consumer is insufficient for him to display interest in a Rule 23 class action brought by private counsel, even to the extent of responding to court ordered notice, why should anyone think that these same consumers will take the steps necessary to claim a share in any settlement or recovery in a proceeding brought by a State lawyer? In this regard, it must be understood that even under the so-called "fluid recovery" concept, which allows damages to be awarded to a whole "class" without any proof of injury to individual class members, no money reaches the individual class member until he has come into court to demonstrate his entitlement to a share in the recovery fund. Thus even a *parens patriae* proceeding calls for a fair degree of consumer initiative and as such is at odds with the basic premise underlying its supposed necessity—that consumers will not take the initiative where their individual monetary stake is so small.

This exposure of the misleading nature of the *parens patriae* concept is not merely my theoretical analysis; it reflects the experience of large consumer class actions. An example is the tetracycline antibiotic drug litigation. Those dozens of cases were brought in the name of many classes of competitors, governmental entities, wholesalers, retailers, and consumers, who alleged price-fixing and other antitrust violations in the production and distribution of tetracycline and related drugs. In those civil suits and the related criminal case, there was never any final finding of liability; nevertheless, the defendants were forced to protect themselves by reaching settlements totaling over $100,000,000. Over $30,000,000 was ostensibly paid as compensation to "consumers", but less than 30 percent of that sum ever reached the purported beneficiaries. Even though the products involved—prescription drugs—were uniquely regulated and subject to record-keeping provisions, only a tiny fraction of the consumers allegedly interested were located or came forward to claim a share.[1] It was a situation in which the potential individual recovery was measured in dollars, whereas in most consumer product litigation individual recoveries would probably be measured in pennies. Nevertheless, despite a financial stake greater than what one would expect to be the norm in *parens patriae* litigation, relatively few of the affected consumers stepped forward to claim their shares of the settlement fund. This experience should make clear that whatever other benefits are claimed for *parens patriae* actions, they provide little realistic prospect for *direct* compensation to injured consumers.[2]

But what of other benefits? Again, the tetracycline experience is instructive. Aside from hefty lawyers' fees, recoveries from the settlement fund in the tetracycline litigation went to support a variety of local social welfare projects. Many of the programs were probably worthwhile, but funding specialized projects is a far cry from paying "compensation" to injured consumers, other than in the simplistic sense that arguably "good" things were being done with the settlement money to compensate for the allegedly "bad" things done to overpaying consumers. Sometimes in the law we penalize wrongdoers by exacting fines that will be used for the general public welfare, but in those instances the policy choices are faced candidly, and no one is under the illusion that "compensation" is being made to injured individuals. But as to one of Title IV's major premises there is an indisputable conclusion: that whatever else Title IV would do it would provide little direct or indirect "compensation" to consumers.

If Title IV will not compensate consumers, the question next arises whether it will be socially beneficial by deterring antitrust violations resulting in consumer

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[1] The number of consumers who submitted provable claims was far less than 30 percent of the alleged class, since there were a significant number of claimants whose intensive use of the drugs meant they were entitled to larger than normal shares.

[2] It also bears noting that, even though the defendants were forced to pay out enormous sums to settle the massive claims against them, subsequent litigation with non-settling plaintiffs led to judgments that the defendants had not violated the antitrust laws at all. The tetracycline litigation, therefore, vividly illustrates the "blackmail settlement" corollary to the *parens patriae* concept .

injury. Measuring deterrence under the best of circumstances is an imprecise science, since it is always difficult to predict which punishments will deter which type of conduct. Witness, for example, the seemingly endless debate over the death penalty. In the context of enforcement of the antitrust laws, analysis is made even more difficult by the fact that Congress only recently amended the Sherman Act to provide for a substantial increase in the severity of penalties for violation of the antitrust laws. It is far too early to evaluate the degree of incremental deterrence that can be traced to these recent amendments; consequenly, it is equally difficult to determine how much, if any, additional deterrence is needed.

There is an additional problem: whether to increase the severity of any penalty must be judged by measuring the likely increase in deterrence against the corresponding increase in hardships and adverse collateral consequences. Let me illustrate by a simple example. In most states it is a form of larceny knowingly to purchase goods with a bad check. Nevertheless, through neglect or inadvertence, almost every otherwise decent, law-abiding citizen at one time or another has found himself overdrawn on his checking account. The law provides criminal penalties for intentional violations, and usually one must compensate the recipient of the bad check for the financial injury he suffered. Suppose that in an imaginary jurisdiction tendering a bad check became an offense punishable by death. Certainly as to those whose conduct was intentional the increased severity of the sentence would weigh rather heavily in any calculation whether to engage in conduct intentionally to defraud. As for the remainder of the population, however, the increased penalty would not serve to diminish the human capacity for error. Still, few would run the risk of incurring the penalty, and many would therefore refrain completely from using checks. As to those whose conduct was unintentional, then, the net effect would be a minimal increment in deterrence but a rather substantial reduction in the use of checks and a much greater reliance on a less sophisticated medium of exchange. Perhaps more importantly, by failing to distinguish between purposeful and negligent conduct, our hypothetical law would in some instance result in the imposition of cruel sentences out of proportion to the severity of the crime. One could hardly call the net effect desirable.

In the context of the present legislation, the situation is equally murky. There has been no consideration whatsoever to making the careful legislative judgments that should be made. Is the marginal deterrence against willful antitrust violations going to be so much more effective than the recently increased threat of major criminal fines and felony jail sentences to justify the potential consequences of unprecedented "damage" awards? What will be the effects on the economy in general or on particular industries of judgments (or settlements) stripping hundreds of millions of dollars from corporate defendants and their shareholders and transferring these sums to unspecified "general welfare" projects? And perhaps most importantly, how much legitimate, creative American enterprise will be stifled because corporate executives will be forced to forego business ventures and expansion lest they expose their shareholders to monumental claims filed under the *parens patriae* device?

Not only must this Committee consider the effects of Title IV on those who would violate the antitrust laws; it also must consider the bill's effect on those whose conduct is entirely blameless—and I think all would agree that this characterization fits the vast majority of American business. The health of our economy is premised upon vigorous competition, and generally speaking, the more vigorous the competitor the more he is to be encouraged. At some point in the continuum, however, aggressive competition turns vicious and may run afoul of the antitrust laws. The length and the complexity of antitrust litigation attests to the fact that the location of this point is rarely easy to predict with anything approaching certainty: indeed, most antitrust litigation revolves less around the determination of particular facts than around the legal characterization to be given stipulated practices. Reasonable men—and even reasonable courts—disagree as to whether a given set of facts should be characterized as constituting a violation of the antitrust laws, although there is a narrowly defined class of behavior that is illegal per se. If we are to encourage innovation and competition that is maximally creative, we should indeed be wary of punishing too heavily those who inaccurately predict that a proposed course of conduct is consistent with the antitrust laws.

The damage provisions of Title IV are nothing less than revolutionary. First, the bill would permit the award of damages for injuries caused to something called the State's "general economy". In testimony before the Subcommittee on Antitrust and Monopoly of this Committee, few, including the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, were able to identify or define a State's "general economy" and explain how one could possibly identify, much less quantify, damages to it. For this reason the Administration has opposed awarding damages for injuries to a State's "general economy", and in the House version of Title IV, H.R. 8532, a similar provision was wisely deleted.

Even more startling is the provision that would permit award of damages to a class without any determination as to the fact or amount of injury to class members. Some proponents of Title IV have been commendably candid in admitting that they favor these damage provisions because in their experience it has proved extremely difficult to demonstrate how antitrust violations damage individual class members. This is a remarkable argument in favor of "fluid class" recovery. It says, in other words, that where public opinion has stamped a particular class of defendants as nasty characters, and where they have been accused of having done nasty things, and where it is difficult to prove whether they injured consumers, Congress and the courts should simply dispense with the necessity for proof!

It is indeed difficult to prove the manner in which an antitrust violation results in economic injury to consumers. This very difficulty suggests a necessity to examine the economic premise—that consumers are directly and demonstrably injured by antitrust law violations—that underlies Title IV. Instead of doing this, Title IV submerges all obstacles to disproof of the premise so ardently assumed. Where anticompetitive activity results in an illegal overcharge by a manufacturer, that overcharge may be absorbed in whole or in part by some wholesalers and not others who may or may not choose to pass on their increased costs to some retailers but not others. The same variables operate at the retailers' level. And, of course, with many component products, the number of levels of the distribution system through which they pass before reaching consumers may be even greater. If this sounds complex, it is, and tracing the impact of an alleged illegal overcharge through the myriad channels of distribution to separate those consumers who have been economically injured from those who have not is a complicated, time-consuming, and expensive process. The reason is obvious: the process reflects the complexity of the underlying transactions.

But dispensing with the requirement of proof of individual injury is not a solution that comports with fundamental principles of due process of law. Fundamental fairness requires that a person accused of doing something improper not be forced to pay "compensation" for injuries unless he has in fact caused them. And in our legal system causation is established by proof, not by conjecture. There is nothing unique about antitrust principles in this respect and it is difficult to see why "damages" should be recoverable by consumer classes without proof of actual injury in antitrust cases when it would be unthinkable to provide for such entitlement in the case of, for example, a breach of a supply contract which may or may not ultimately have some effect on the prices paid by consumers. It is simply no answer to say that there should be especially intense deterrence and especially summary procedures for possible antitrust violations. Shooting random antitrust defendants or returning to the days of trial by ordeal might also result in greater deterrence, and would certainly be less time consuming, but our legal system is of course based on due process of law. Title IV, unfortunately, in its headlong effort to "do something" for consumers is insensitive to the means being chosen to achieve that end.

The constitutional error in authorizing lawsuits for the recovery of damages for "injuries" that are not proved in the adversary setting is compounded by the attempt to authorize State attorneys general to bring these suits. The "standing" requirements embodied in Article III of the Constitution require that suits may be brought only by persons who have suffered injury themselves and who as a consequence have a personal stake in the outcome of the litigation. Just last spring, in *Warth* v. *Seldin*, 422 U.S. 490 (1975), the Supreme Court explained that, even though Congress has some authority to create a right of action for persons who would otherwise be barred from suing "by prudential standing rules, [o]f course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury *to himself*, even if it is an injury

shared by a large class of other possible litigants." (Emphasis added.) Thus, it is doubtful whether Congress can validly authorize a State attorney general to sue for damages if neither he nor the State can allege and prove "a distinct and palpable" personal injury. In *Warth* the Court also rejected, on constitutional grounds, the premise of fluid class recovery by holding:

> Moreover, in the circumstances of this case [which are comparable to a *parens patriae* suit for damages to a class of consumers], the damage claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and *both the fact and extent of injury would require individualized proof.* (Emphasis added.)

Section 4C(c)(1) of Title IV would run afoul of this express holding by purporting to dispense with what the Court in *Warth* said cannot be avoided, for that section purports to allow "damages" to be "proved and assessed in the aggregate . . . *without separately proving the fact or amount of individual injury or damage* to such natural persons." (p. 57, *1.* 23 through p. 58, *1.* 2). This Committee can scarcely countenance such a transparently unconstitutional device.

By disregarding the constitutionally-mandated law of standing and by disregarding the dictates of due process of law, Title IV would create massive liabilities on a scale analogous to the overkill discussed in the bad check hypothetical above. To be sure, such a remedy might well add additional deterrence against those who would *willfully* violate the antitrust laws. However, as to those whose violations were not willful, the damage provisions, which cannot be justified in the name of consumer compensation, would extract a penalty entirely out of proportion to any wrongdoing.

This consequence is particularly egregious for the vast majority of businessmen whose conduct is totally consistent with the antitrust laws. The courts have generally refused to accept the *parens patriae* or "fluid class recovery" concepts in litigated cases because, among other reasons, of a recognition that the mere filing of a *parens patriae* complaint will generate enormous pressures to settle, a sort of institutionalized blackmail. The tetracycline litigation, discussed above, illustrate this. That case involved one of the earliest uses of the concept, before the judicial recognition of its problems had time to evolve. Once a *parens patriae* complaint is filed, with possible recoveries reaching the hundreds of millions of dollars, how could a prudent businessman, still presumptively innocent of any wrongdoing, fail to reach an out-of-court settlement? The *parens patriae* concept is, in short, the mechanism for systemized injustice. Thus, apart from the legal and constitutional issues, it would be most unwise for Congress to give its stamp of approval to this now discredited device.

Violators of the antitrust laws need not retain their ill-gotten gains, and intentional violations need not go undeterred or unpunished, even if the *parens patriae* concept is rejected. If the Committee is satisfied that large numbers of antitrust violations are going undeterred and that major corporations are retaining illegal profits—assumptions that have yet to be substantiated—there are other ways to deal with those problems. Title IV, however, is fatally flawed and cannot legally or practically satisfy what its proponents claim to be its objectives.

Mr. HANDLER. Mr. Senator and members of the committee, I would like to express the view that this is one of the most far-reaching pieces of legislation facing the present Congress—perhaps one of the most important measures that the Congress has had to consider in recent years. I find that the legislation is replete with strange and unexpected provisions which are not apparent on a first reading. We ought not to rush to get this lengthy and complex measure before the Senate without the most careful consideration of each and every one of its sections and titles. There is too much at stake for us to proceed before all of us understand the whys, wherefores, and origins of each of the reforms the bill would inaugurate.

The country is slowly emerging from the most serious recession in the postwar period. Our people are beginning to regain their equilibrium after the disillusionments of Viet Nam and Watergate. The confidence of the American people in their institutions is at an all-

time low, but the erosion seems to have been balked and a renascence of the Nation's spirit seems underway.

The problems confronting the country are immense in their complexity. Our cities are in a state of decay. Unemployment is above a tolerable level. The extent of our annual deficits is alarming. Our financial structure exhibits surprising weaknesses. We are a long distance from solving our energy problems, and our foreign affairs are in a state of disarray. One could go on and on in enumerating the problems, social, economic, and political, that crowd down upon us. Yet, there is no problem that we cannot solve if we remain united as a people and concert our intellectual and physical forces towards the formulation of constructive and rational solutions and the creation of the widest possible consensus in their support.

I ask the committee:

Is it constructive and wise in this critical period to launch an allout war against our major corporations in the guise of preventing and eliminating oligopoly? Is it in the national interest to threaten business with the forfeiture of its assets in the event the antitrust laws are violated? Is it conducive to good relations with our western allies to require their companies to violate their laws in order to satisfy the discovery demands of the litigants in our courts?

Is it promotive of effective law administration to shatter the secrecy that historically has enshrouded the processes of the grand jury? Is it wise to throttle the merger process with restrictive procedures that violate our principles of fair play and justice? Is it right and consistent, with the precepts of due process, to give retroactive application to drastic changes in the law, in effect imposing ex post facto penalties of astronomical dimension on our business units?

Can we safely ignore the mounting crisis of the Federal courts by increasing their workload without a relative increase in the number of judges and supporting personnel? Are the benefits of parens patriae and class actions to consumer worth the cost which we surely will have to pay for these devices? Are there not available more effective and less costly remedies for safeguarding the consumer interest? And, finally, is S. 1284 the way to bring about national unity to hasten the industrial convalescence from the ravages of the recession and to restore the health and well-being of our sorely troubled society?

I would hope, Mr. Senator, that my views may be of some help to the committee in its review of S. 1284 in the markup sessions scheduled for later this month. I would also hope that business would not be treated as an alien intruder in our society, and that the committee and the Congress will not saddle it with punitive and unquantifiable liabilities that would disable it from making the contributions to our economic recovery which are so vital to our very survival as a nation.

Thank you very much.

Senator BURDICK. Thank you for your contribution this morning. And, of course, you know your full statement will be made a part of the record.

The committee will be in recess until further call.

[Whereupon, at 11:30 a.m., the proceedings were recessed, subject to the call of the Chair.]

000912

CONGRESS OF THE UNITED STATES

Charles E. Wiggins

Member of Congress • 39th District, California

March 16, 1976

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Committees:
JUDICIARY
HOUSE ADMINISTRATION

Administrative Assistant
MICHAEL W. BLOMMER

Legislative Assistant
JOHN E. MERCER

District Representative
M. ROY KNAUFT

Washington Office
2445 Rayburn HOB
Washington, D.C.
ZIP 20515
202-225-4111

District Office
Brasheers Center—
Suite 103
1400 North Harbor Blvd.
Fullerton, Ca. 92635
714-870-7266

Honorable Roman L. Hruska
United States Senate
Washington, D. C.

Dear Roman:

During the course of my testimony before your subcommittee, several questions were asked of me. Following is a response to the questions put by you, and other members of the subcommittee, for inclusion in the record if you deem it appropriate to do so.

On page 774 of your record, Senator Thurmond requested that I respond to certain written questions. The questions and my responses thereto are as follow:

1. Question: Would you care to comment on the possibility that the enactment of Title IV Parens Patriae will result, as a defensive mechanism of business, in higher prices to consumers?

Answer: Enactment of the parens patriae provisions of S. 1284 could lead to increased prices to consumers. Businesses sued under the parens patriae mechanism will be faced with the costs of defending themselves. Presumably those suits will be in addition to any other antitrust litigation in which the businesses may have to pay attorney fees. The costs of defending against this additional litigation will no doubt be passed on to consumers in the form of higher prices.

Also, it is possible for business behavior which allegedly violates the antitrust laws

to result in lower prices. Those situations may include cases in which a manufacturer has set a maximum resale price or has lowered prices for a predatory purpose or in order to expand his market. It is foreseeable that in such cases the cessation or injunction of the practices through antitrust lawsuits may result in higher consumer prices. (It is a premise of antitrust policy, however, that keener competition should yield lower prices in the long run.)

2. Question: In your opinion would a labor union be subject to suit as an antitrust violator under Title IV?

Answer: The parens patriae legislation would in no way alter the substantive liability of labor unions under the antitrust laws. Human labor is not regarded as commerce under the antitrust laws. There are limited situations in which labor unions may be in violation of the antitrust laws, but these situations are no more likely to occur under parens patriae than today. To the extent that liability may exist under current law, the exposure of unions to damage claims is increased enormously under the parens patriae theory of recovery.

3. Question: Would it be fair to label the damages provisions of Title IV as highly speculative?

Answer: S. 1284 contains a provision for assessing damages to the general economy, and that form of damages was considered speculative in the California v. Frito-Lay opinion. The measure of damage to the general economy of the State in terms of lost revenue or additional expenses would be highly speculative, since the general economy may actually be

stimulated through increased sales or tax revenue by business behavior that is later found to violate the antitrust laws.

As for the aggregation of the damages to the members of the class, if you accept the concept of statistical aggregation and if the sample of plaintiff claims is scientifically selected, then you should not regard the damage aggregation as speculative. Other problems arise with this form of damage determination, however. An enormous burden will fall upon the courts as they hear perhaps thousands of plaintiffs' claims, depending upon the size of the class. The actual damages to consumers will not always be clear or uniform, and the impact of overcharges may be very difficult to locate and quantify as they are passed down or absorbed in a manufacturer's chain of distribution consisting of several middlemen. While the damages may not be "speculative", they will require the courts to deal with very complicated proof mechanisms.

4. Comment further on why, under this bill, plaintiffs in a class action would not be required to show damages.

Response: If the sections of S. 1284 that relate to proof of damages provide that no parties are required to prove damages, then the law may well be unconstitutional. Read literally, S. 1284 would appear to require no proof of damage to any individual plaintiff. On the other hand, if individuals are brought forward to prove their damages as representatives of a class or as members of a sample for purposes of aggregation of damages, then the constitutional requirements would be met.

On page 779 of the record, I was asked to furnish the page references to the testimony in the House on the parens patriae legislation. I can only respond to this question by making reference to the printed record in the House which I shall forward to the subcommittee under separate cover.

On page 781 of your record, I was asked for a status report of the various House bills which consider the substance of the titles to S. 1284. The separate titles of the Senate bill are being considered as follows:

> Title II, the anti-trust civil process procedure, is embodied in H.R. 39. That bill is pending in subcommittee.
>
> Title III of S. 1284 is also pending in subcommittee.
>
> Title IV, the parens patriae provisions, have, of course, been reported by the Judiciary Committee and are now pending before the full House.
>
> Title V, the pre-merger notifications provisions, are not embodied in a comparable House bill but a subcommittee of the House is scheduled to consider this general subject matter within the next few days.
>
> Title VI, the nolo contendre provisions, are not embodied in comparable House legislation.
>
> Title VII of the Senate bill is not embodied in separate House legislation, but the substance of this title is being considered by a subcommittee of the House simultaneously with its Consideration of the pre-merger notification provisions.

On page 795, I was asked for the citation of the case in California against real estate brokers. The case is Kline v. Coldwell, Banker and Co., 508 F. 2d 226 (9th Cir., 1974).

Sincerely,

CHARLES E. WIGGINS
Member of Congress

CEW:bvp

DICKSTEIN, SHAPIRO & MORIN

THE OCTAGON BUILDING
1735 NEW YORK AVENUE, N. W
WASHINGTON, D. C 20006
202 785-9700

CHARLES H MORIN
DAVID I. SHAPIRO
SIDNEY DICKSTEIN
ARTHUR J. GALLIGAN
JUDAH BEST
HENRY C CASHEN II
JAMES VANR. SPRINGER
RICHARD LITTELL
THOMAS W MACK
GORDON P RAMSEY
ARTHUR O MASON
FREDERICK M LOWTHER
ROBERT J. HIGGINS
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RICHARD P. PERRIN
GEORGE T. BOGGS
JOEL B. KLEINMAN
JUSTIN D. SIMON
BARRY WM LEVINE
LESLIE J. RUBEN

NEW YORK OFFICE
745 FIFTH AVENUE
NEW YORK, N Y 10022
212 832 1900

BOSTON OFFICE
ONE BOSTON PLACE
BOSTON, MASS 02108
617 723 8100

March 1, 1976

Honorable James O. Eastland
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Re: S. 1284

Dear Mr. Chairman:

As a member of the American Bar Association and its Antitrust Section, I wish to point out to the Committee that the opposition to Title IV of S. 1284 (parens patriae amendments) expressed by certain ABA representatives does not necessarily reflect the views of the membership of either the Association or the Section. That opposition reflects only the individual views of fifteen members of the Section's Council and the twenty-three members of the Association's Board of Governors. I do not share their views, and I am sure that the Section and the Association have many members who do not share their views.

The record of the Hearings on S. 1284 held by the Subcommittee on Antitrust and Monopoly last year elucidates the manner in which the ABA position was adopted. A May 19, 1975 letter to Senator Hart from Mr. Comegys (the ABA spokesman) acknowledges that no effort was made to poll the 8,500 members of the Antitrust Section about the Bill and that the position was determined by the Council members present and voting at a meeting held in Key Largo on March 1, 1975 (Hearings pp. 712-714). That position was summarily endorsed by the Board of Governors at an April 9, 1975 meeting

in Chicago without submission to the House of Delegates because action was expected on the corresponding House bill within the near future (Hearings pp. 709, 711). So far as I am aware, no effort has been made to submit the question to the ABA House of Delegates or anyone else in the full year that has elapsed since the vote of the Board of Governors. In particular, the question was apparently not included in the legislative matters debated by the House of Delegates at its meetings in Montreal in August 1975 (see 61 ABA Journal 1079-1090).

Similarly, the opposition to other Titles of S. 1284 more recently expressed by ABA representatives reflects only the views of the members of the Antitrust Section Council and the Board of Governors and no effort has been made to determine my views or those of other members of the Section and the Association.

Under these circumstances, I submit that the views of the ABA representatives who have testified on S. 1284 carry no greater authority than those of various other knowledgeable members of the private bar who have testified for and against the bill. The views of those representatives and of the ABA Council and Board of Governors are affected by their professional relationships with large corporations that are potential antitrust defendants, just as my own support of the bill is no doubt influenced by the fact that my firm represents a number of States as antitrust plaintiffs. None of us can speak authoritatively of the views of the bar at large, and our individual views should be judged only on the basis of the reasoning that supports them.

Very truly yours,

James vanR. Springer

AMERICAN BAR ASSOCIATION

GOVERNMENTAL RELATIONS OFFICE

1800 M STREET, N.W. WASHINGTON, D.C. 20036 TEL. (202) 331-2200

DIRECTOR
Herbert E. Hoffman

ASSOCIATE DIRECTOR
Gene S. Bergoffen

STAFF DIRECTOR FOR ADMINISTRATION
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Alice Fins

ASSISTANT TO DIRECTOR & ASSOCIATE DIRECTOR
Craig H. Baab

March 16, 1976

Honorable James O. Eastland
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

By letter dated March 15, Mr. Ira Millstein forwarded to you responses to questions raised by members of the Committee when he and other ABA witnesses testified on S.1284, the proposed Antitrust Improvements Act. Included in Mr. Millstein's responses were answers to questions later posed by Senator Thurmond.

We have discovered an error in the fourth paragraph of page 17; the last word of that paragraph, "unlawful",should be "lawful".

Since copies of the March 15 letter were sent to all members of the Committee, I am also forwarding corrected pages to them.

Sincerely,

Herbert E. Hoffman

HEH:las

Enclosure

cc: Members of the Committee on the Judiciary

The nearly automatic character of temporary restraining orders and preliminary injunctions is particularly harmful, because, as history shows, preliminary injunctive relief often has the practical effect of final relief. The grant of a preliminary injunction often aborts the merger for business reasons. Since, under Title V, injunctions would be granted whether or not the Government has a likelihood of success, many lawful and even pro-competitive mergers would be frustrated.

Tender offers would be affected with particular severity. Since the success of a tender offer usually depends on market conditions at the time of the offer, any delay is likely to abort the offer. The shareholders, as well as the public, may suffer.

Automatic hold-separate orders are also unwarranted and can be detrimental to the proper and efficient operations of the merged enterprise. Even more detrimental to competition is the provision for a give-up of profits. If the acquiring firm risks a give-up of profits, its incentive to improve the performance of the acquired company and to operate it with the greatest efficiency is substantially dampened.

The provision for a give-up of profits is punitive. The punitive nature of subparagraph (g) is particularly ironic when one considers that subparagraph (g) cases are those cases in which the Government did not bother to get or could not get a preliminary injunction under the relaxed standards of subparagraph (d), presumably because the merger was probably lawful.

The effect of Title V will be to frustrate and abort many lawful transactions.

Title VI

Question: Comment, if you will, on the change in meaning of

Resolution approved by Board of Governors October 1975

REPORT TO THE
BOARD OF GOVERNORS
SECTION OF ANTITRUST LAW

Recommendation

The Section of Antitrust Law recommends adoption of the following resolutions:

BE IT RESOLVED, that the American Bar Association opposes passage in its present form of S.1284, the Antitrust Improvements Act of 1975, or any similar legislation, now pending in the 94th Congress, 1st Session;

BE IT FURTHER RESOLVED, that the American Bar Association expresses its profound concern over the apparent departure from established legislative procedures for the consideration of matters of such importance as S.1284, in that a number of the provisions within the conglomeration of substantive and procedural changes to the antitrust laws which the bill would make, including the findings and declaration of policy: (i) have not been the subject of full legislative hearings or any meaningful analysis as to their potential consequences upon the free enterprise system (Title I, Sections 701, 704); (ii) have been offered for serious legislative consideration despite the absence of any showing of compelling need which would justify such significant changes (portions of Titles II, III, and VII,

and all of Title VI); or (iii) have failed to receive the support of the federal antitrust enforcement agencies which such provisions are supposedly intended to assist (Title VI and portions of Titles II, IV, and V);

BE IT FURTHER RESOLVED, that the American Bar Association specifically recommends that each of the Titles of S.1284 be dealt with by Congress in the following manner:

1. Title I should be modified to contain only those findings which relate to investigatory, procedural and remedial matters, or if there be none so relevant, deleted.

2. Title II should be modified: (a) to explicitly require preliminary identification of the target and scope of an investigation; (b) to limit the application of the amended procedures to representatives of the target of the investigation; and (c) to allow counsel for the target of the investigation access to materials and transcripts collected, pursuant to appropriate confidentiality protective orders, and to be present at all depositions, with the right to cross examine third parties and generally to lodge appropriate objections.

3. Title III should be modified: (a) to permit a court to reduce civil penalties below $1,000 per day if there are mitigating circumstances; (b) to permit a court to stay the accumulation of daily penalities when the subpoena or order is questionable and good faith objections have been raised; and (c) to authorize as a ground for enjoining such compulsory process, the fact that the inquiry being made is beyond the authority of the agency.

4. As adopted by the Board of Governors by Resolution in April 1975, and reaffirmed herein, Title IV should be modified: (a) to add the general safeguards of Rule 23 of the Federal Rules of Civil Procedure; (b) to bar recovery for damages to the general economy of the state; (c) to require actual notice to those persons to be benefited by the attorney general's suit whose identity can be ascertained readily; and (d) to require proof of actual damages in treble damage actions.

5. Title V should be modified: (a) to establish a more reasonable minimum value for the transactions to be within its reporting requirements;

(b) to eliminate the ability of government enforcement agencies to extend, at their discretion, the waiting period required before a merger or acquisition can be consummated, pending government analysis of its legality; (c) to modify the automatic authority to be granted to a government enforcement agency to obtain upon request a preliminary injunction against consummation of a merger or acquisition so that such relief will be granted only upon a showing of probable illegality; (d) to revise the provision granting hold-separate orders in order to require the government to show the need for such an order; and (e) to eliminate the provision requiring the forfeiture of all benefits of the acquisition if it is subsequently found to be unlawful.

6. Title VI, which provides that nolo contendere pleas entered in criminal antitrust suits are to be given prima facie effect in subsequent private suits, should be deleted.

7. Title VII should be deleted with the exception of Section 705, which should be amended to provide for judicial discretion in awarding counsel fees in injunction suits.

BE IT FURTHER RESOLVED, that the President of the Association or his designee be authorized to appear before the appropriate committees of Congress to present testimony in support of the Association's Resolutions and otherwise to communicate these Resolutions to such committees and their members.

REPORT

Consideration of S.1284 by the Board of Governors of the American Bar Association is essential at this time because the Bill has been reported by the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, for consideration by the full Judiciary Committee, without recommendation, and the Judiciary Committee is, at this time, considering final action with respect to the Bill. No further hearings are scheduled. However, the record remains open for acceptance and consideration of ABA resolutions with respect to the Bill. As of this time, the ABA has been heard only with respect to one of the seven titles of S.1284, despite the fact that each title represents significant Antitrust Legislation.

S.1284, the Antitrust Improvements Act of 1975, is an omnibus bill to amend the Antitrust Civil Process Act, Federal Trade Commission Act, Clayton Act, and Sherman Act.

Its seven titles are not substantively related to one another -- other than that they relate to "antitrust"; they contain a conglomeration of provisions which would broadly affect antitrust law and procedures. A number of the modifications have merit and, as discussed below, are supported by the Section of Antitrust Law in their present or modified form. A number of the proposals, however, are not "Improvements" as the title of the bill suggests, but in fact would have significantly adverse effect on the free enterprise system which the bill professes to protect, and have actually been opposed by the federal agencies that enforce the antitrust laws. Other provisions have been proposed despite the absence of any showing of compelling need or analysis which could justify their enactment. Still another provision was added after hearings were concluded, and without any notice, despite the fact that it would dramatically change Section 2 of the Sherman Act, a provision which has not been substantively altered since 1890. Finally, the bill contains a declaration of policy that has little if any relationship to its substantive provisions, and adopts a controversial economic premise that is widely debated and hence far from established.

For these reasons, the Section of Antitrust Law obviously cannot endorse S.1284 as presently drafted. Rather, the Section has considered each Title separately and has attempted to isolate and support those positions which, based upon experience and study, merit support. At the same time the Section has isolated for opposition those portions which, for the foregoing reasons, should be eliminated or modified. This report will, therefore, discuss the seven Titles separately and specifically, since each is in reality a free-standing separate piece of legislation.

The bill's seven Titles, and the position of the Section of Antitrust Law with respect to each, can be summarized as follows:

Title I: The Delaration of Policy recites that increased industrial concentration has been a prime cause of such economic problems as inflation and unemployment. The Antitrust Section opposes this Title because (a) it does not relate to the procedural focus of the bill, and (b) it establishes a legislative finding on propositions which are still highly controversial and far from resolved. This Title requires deletion or substantial revision.

Title II: This Title would significantly expand the investigative powers of the Department of Justice under the Antitrust Civil Process Act, primarily by granting the Department of Justice novel powers analogous to those of a grand jury, without appropriate safeguards. The Antitrust Section supports a more limited increase in such powers than are proposed in the bill, and recommends the addition of safeguards for those subject to the increased powers.

Title III: These provisions would amend the Federal Trade Commission Act by increasing substantially the civil penalties for failure to comply with Commission orders and subpoenas, and by lessening the ability of those defending against Commission processes to stay the accumulation of penalties during the course of litigation and to enjoin such processes. The Antitrust Section recommends amendments to give more discretion to courts assessing such penalties, and to codify existing case law on the subject matter.

Title IV: This Title would authorize state attorneys general to institute parens patriae suits to obtain treble damages on behalf of all state residents against antitrust defendants without proof of individual claims, and to obtain

damages for injury to the "general economy" of the state. The Antitrust Section recommends addition of certain safeguards to class actions contained in Rule 23 of the Federal Rules of Civil Procedure, and deletion of the provision allowing recovery for injury to a state's "general economy" -- a speculative concept that will inevitably lead to duplicative recoveries.

Title V: This Title would require virtually all companies that seek to acquire or merge with other companies, to notify federal enforcement agencies, would stay the transaction pending clearance, would authorize the government to obtain preliminary injunctions automatically, and would relieve the government of showing a need for a hold-separate order. The Antitrust Section recommends amendments which would provide for judicial supervision over the regulatory aspects of this proposal, and which would relate Title V more to the legal and economic underpinnings of the antimerger laws.

Title VI: This provision would permit private antitrust plaintiffs to use as prima facie evidence of a violation a nolo contendere plea entered by the defendant in a previous criminal suit. The Antitrust Section urges deletion of this Title because it would adversely affect the enforcement needs of the Department of Justice, and would significantly increase judicial workload while providing little aid to the antitrust plaintiffs it is intended to benefit.

Title VII: Of most significances, Section 704 would eliminate all of the requirements for finding an unlawful "attempt to monopolize" under Section 2 of the Sherman Act, other than specific intent, a drastic substantive change in the law which the Section opposes on the ground that it eliminates essential elements of this antitrust violation, without regard to the legal and economic consequences. Other miscellaneous provisions would: expand the jurisdictional reach of the Robinson-Patman Act and Section 3 of the Clayton Act, an expansion which the Antitrust Section opposes as unsupported and unnecessary; authorize special handling of "complex" antitrust cases through a provision that is believed by the Section to be unnecessary and legally and ethically unsound; impose sanctions on persons who decline to furnish evidence in antitrust suits because of the prohibitions of foreign law, sanctions which the Antitrust Section opposes because they are unnecessarily disruptive of foreign relations and international law; and, provide for attorneys' fees in private antitrust suits

seeking injunctive relief, which is endorsed by the Section so long as the courts are given discretion to decide the propriety of such an award.

A detailed analysis of the Section of Antitrust Law's position on each Title follows:

Title I -- Declaration of Policy

Title I of S.1284 consists of a recitation of certain "findings and declarations" of the Congress which are purportedly relevant to the subject matter of the bill. S.1284, however, addresses primarily investigatory, remedial and antitrust enforcement procedures, and the "findings and declarations" of Title I do not appear germane; rather, the Declaration of Policy constitutes a compilation of conclusory assertions founded upon sharply controverted economic theories. Since all the findings and declarations of Title I are not integral to the bill, and because they raise much-debated economic issues which the bill itself does not purport to resolve, the Declaration of Policy should be eliminated, or else revised to relate more precisely to the subjects matter of the bill.

The Declaration of Policy draws numerous conclusions regarding the impact of "monopoly and oligopoly power," without defining that term in any way. In so doing, it needlessly confuses notions of business structure and business behavior -- critical and controversial issues of substantive antitrust law -- in the context of a bill which purports to improve the procedures available to the government agencies charged with enforcement of our antitrust statutes. The question of business structure and its effects on competition has been separately considered by the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee in the context of its exhaustive hearings on Senator Hart's Industrial Reorganization Bill. That bill is a more appropriate vehicle for the study of such issues.

In any event, antitrust statutes such as the Sherman Act and the Clayton Act are intended to reach anti-competitive acts or practices, while the Declaration of Policy appears to be an effort to establish legislatively that "oligopoly or monopoly power" alone is anti-competitive and is casually related to a complex of undesirable economic conditions, such as inflation and unemployment. Such causation simply has not been proven, and most responsible economists concede that reasonable men may well differ with respect to the impact of "oligopoly or monopoly power" upon such economic conditions. In fact, the evidence does not support the assertion in subparagraph 2 of Title I that there has been a "decline of competition in industries in which oligopoly or monopoly power exists"; in

the auto industry, for example, an industry often cited as the prototypical concentrated industry, the state of competition may be considered quite healthy.

But further, the relationship between "oligopoly or monopoly power" and such economic ills as unemployment and inflation is hardly clear and convincing. Professor Milton Handler focused upon one breakdown in the casual nexus as an example in his Statement before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, June 3, 1975:

> take, for example, the "finding" that increased concentration has contributed to our high rate of inflation. I have recently had occasion to study the scholarship in this area and I can state, without qualification, that there is a complete lack of unanimity among economists as to whether concentration has any impact on inflation whatsoever. A 1969 study by the Department of Justice concluded that concentration may, indeed, dampen inflation. Attorney General Levi, at his confirmation hearings, made a similar observation. There was the sharpest divergence of opinion on the question at a conference of economists sponsored by the Council on Wage and Price Stability in April.

Similar statements may be made with respect to unemployment, inefficiency, underutilization of economic capacity, a reduction in exports, and an adverse effect on the balance of payments, which concludes the litany of ills recited in the Declaration of Policy.

Moreover, a claim that any causal nexus between "oligopoly or monopoly power" and these conditions of economic instability exists is hardly consistent with the position adopted by the Federal Trade Commission in initiating its Line of Business reporting procedures. The Commission asserts that its Line of Business study is intended to facilitate evaluation of the theories contained in the Declaration of Policy, acknowledged as not being established.

In summary, so long as the evidence with respect to the causal nexus, if any between "monopoly and oligopoly power" and the various economic difficulties recited in the findings and declarations is conflicting, to legislate that such causation exists seems unreasonable.

For these reasons, the substantially non-germane and highly contested Declaration of Policy should be revised substantially to relate to the focus of the bill or should be entirely deleted.

Title II -- Antitrust Civil Process Amendments

Title II of S.1284 would significantly amend the Antitrust Civil Process Act to vest in the Department of Justice investigatory powers comparable to those of the grand jury. Similar augmentations of the powers of the Department of Justice have been considered and rejected by the Congress in the past, based upon substantial hearings and consideration of voluminous testimony and evidence.

In principle, expansion of the investigatory authority of the Department of Justice may be conducive to proper enforcement of the antitrust laws and is not, therefore, objectionable in itself. Whether the scope of the contemplated authority is consistent with our traditional views of law enforcement, or can be exercised without significantly threatening traditional rights of due process, however, are substantial questions which merit careful Congressional attention. If, despite its history in considering the subject, Congress is now determined to provide such broad new powers, then it must include certain minimum safeguards to protect the rights of those being investigated while these novel procedures evolve. As is the case with any governmental institution charged with prosecutorial responsibilities, the Department of Justice will surely prove a more worthy repository for Congressional and public trust if its discretion to investigate in the antitrust field is properly limited by traditional requirements of due process and confidentiality.

First and most significant, the bill ought to provide expressly, as the present law now requires, that the new procedures require a preliminary identification of the target of any investigation. At the time of the initiation of the investigation, the Department of Justice should provide proper written notice to the target of the investigation, including a full description of the nature of the investigation, the applicable provision of law and the particular matters which are subject to investigation. Such identification and notice are a necessary foundation for the collection of information responsive to the investigation by the target thereof and for the preparation of an appropriate defense. Also, the written

notice should define and limit the parameters of the investigation. Unlike the present bill, the Federal Rules of Civil Procedure are specifically framed to limit the scope of proper discovery to the subject matter of the pleadings in order to avoid unnecessary costs and expenses; under Title II, which specifies no similar reference point, government investigators may be tempted to venture far afield in their investigative demands.

Second, the use of the procedures delineated in Title II ought to be limited to representatives of the target of the investigation. Without such a limitation, many other persons will be subject to the burden of unlimited inquiries by well-intentioned government investigators. Innocent persons, or persons simply unacquainted with the facts of the matter under investigation, may be needlessly embroiled therein at considerable personal time and expense.

In all events, counsel for the target of the investigation should have proper notice of the taking of any oral testimony, and should have the right to cross examine witnesses who are not associated with the target and to lodge appropriate objections to any testimony offered, since such testimony may well be used by the government at trial in a follow-on action or in some ancillary proceedings involving the interests of the target. For the same reason, counsel for the target company should have access, subject to appropriate protective orders to ensure confidentiality, to all materials collected under these procedures, including deposition transcripts, documents and interrogatory answers. In addition to ensuring procedural fairness, access by the target of the investigation to all such materials may well expedite the resolution of the investigation.

Finally, the confidentiality of all materials produced pursuant to procedures under Title II should be preserved, at least by exempting such materials from the disclosure provisions of the Freedom of Information Act. Assistant Attorney General for Antitrust Kauper testified on May 7, 1975 as follows in support of the preservation of confidentiality:

> We would favor clear and complete exemption from FOIA for any information, in whatever form, obtained through a CID. By definition, such information is investigatory and frequently consists of confidential business data. While it would thus probably be exempt from disclosure in any event, we strongly favor specific statutory language to that effect.

These recommendations for amendment of Title II of S.1284 would not undermine Congress' objective to augment the civil investigatory authority of the Department of Justice, but they would assure the procedural rights of the target of any investigation and would reduce substantially the likelihood of prosecutorial excess. Such changes are critically important if the Congress is to avoid the creation of more substantial problems than it seeks to cure.

Title III -- Federal Trade Commission Act Amendments

Title III would seriously restrict, far beyond present law, the ability of respondents to challenge Commission subpoenas and orders. It would substantially increase the amount of non-discretionary minimum daily penalties which would automatically accrue before a stay or determination of legality could be obtained. Additionally, it would impose rigid standards to be employed by a court in determining whether to stay such statutory penalities, and it would limit the circumstances under which the Commission's compulsory processes could be enjoined.

Under present law, Commission subpoenas and other compulsory processes can be enforced by three methods, either separately or together: (i) an injunction proceeding under Section 9 of the Federal Trade Commission Act, which can be initiated by the Commission immediately after default by means of an order to show cause, providing prompt relief; (ii) a forfeiture suit for civil penalities of $100 a day, which can be initiated beginning thirty days after the Commission has served a notice of default; and (iii) a criminal suit for willful refusal to comply with Commission processes, punishable by a fine of $1,000 to $5,000, imprisonment of up to one year, or both. The decisions indicate that these procedures provide sufficient safeguards to assure compliance with the Commission's lawful subpoenas and orders.*

Section 301(a) would amend Section 10 of the Federal Trade Commission Act by increasing the civil penalties for failure to file an annual or special report or to obey a Commission subpoena from the present $100 per day commencing thirty days after notice of default, to a minimum of $1,000 to a maximum of $5,000 daily commencing fifteen days after such notice.

* See, e.g., St. Regis Paper Co. v. United States, 368 U. S. 201 (1961); United States v. Morton Salt Co., 338 U.S. 632 (1950); Genuine Parts Co. v. FTC, 445 F.2d 1382 (5th Cir. 1971); FTC v. Sherry, 1969 Trade Cases ¶72,906 (D.D.C. 1969). No decisions have been uncovered indicating that the Commission has as yet found it necessary to seek the criminal penalities presently authorized by statute.

While an increase in the daily forfeiture penalty may be appropriate to adjust for the impact of inflation, there appears to be no reason for cutting in half the time period before such penalties start accruing, particularly in view of increasingly heavy court calendars which extend the time before the accumulation of such penalties can be stayed or the merits of a respondent's challenge can be considered. Additionally, it is important that there be judicial discretion to reduce the daily penalty below the $1,000 minimum proposed in Section 301(a), particularly since Commission processes can be directed at small companies and individuals who may not even be targets of an investigation.

Additionally, Title III would not, as stated by its sponsors, codify case law dealing with the enforceability of Commission compulsory processes. Under present law a respondent may stay the accumulation of civil penalties by establishing that the challenge to a Commission subpoena or order is being made in "good faith."* In its place, Section 301(b) would create a rigid three part test forbidding a stay of penalities unless the respondent could demonstrate: (i) a substantial probability of success on the merits; (ii) irreparable harm unless the penalties are stayed; and (iii) equities clearly favoring a stay. This standard would be more difficult to meet than the "reasonable probability of eventual success" which must be shown by a party seeking a preliminary injunction, and approaches the criminal law standard of "beyond a reasonable doubt." Such an imposing standard for obtaining a stay of penalties while defending against Commission process claimed to be unlawful raises serious due process questions.**

Since the Commission has available summary procedures to obtain injunctive relief under Section 9 of the Federal Trade Commission Act against those who refuse to comply with a valid subpoena,*** and considering that Title III would substantially increase the maximum daily penalties obtainable by the Commission in forfeiture suits under Section 10 of that statute, considerable evidence that Commission enforcement of its processes is being significantly hindered should be required before the judicially established "good faith" test for staying the accumulation of penalties during pendency of a legal challenge to a subpoena is legislatively overruled.

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* See St. Regis Paper Co. v. United States, supra at 226-27; Genuine Parts Co. v. FTC, supra at 1394.

** See St. Regis Paper Co. v. United States, supra at 225-26.

***See United States v. Associated Merchandising Corp., 256 F. Supp. 318 (S.D.N.Y. 1966).

Finally, under Section 301(b) a Commission subpoena or order could be enjoined on the merits if it is shown that compliance is "unduly burdensome" or that the information sought "is not reasonably relevant to the inquiry being conducted." The bill fails to authorize an injunction if the respondent demonstrates that the inquiry is not within the authority of the agency, despite unequivocal Supreme Court rulings that Commission compulsory process is unconstitutional under such circumstances.* Revision is essential to correct this deficiency.

Title IV -- Parens Patriae Amendments

In March 1975, the Section of Antitrust Law reported to the Board of Governors with respect to parens patriae antitrust legislation pending before the House of Representatives, and a Resolution endorsing the position of the Antitrust Section was adopted by the Board of Governors in April 1975.

Thereafter, Walker B. Comegys testified in May 1975 before the Subcommittee on Antitrust and Monopolies of the Senate Judiciary Committee with respect to Title IV of S.1284, which is comparable to H.R. 38, the original designation of the bill which was the subject of the Resolution adopted by the Board of Governors. Mr. Comegys expressed the views contained in that Resolution.

The Section of Antitrust Law believes that the position expressed in the Resolution adopted earlier this year should be maintained. The portions of that Resolution regarding H.R. 38 which remain relevant to Title IV of S.1284 are set forth below, with those parts deleted which are irrelevant to the present version of Title IV:

> WHEREAS, H.R. 38 would authorize states attorneys general to bring federal antitrust suits for recovery of damages sustained by citizens of their respective states; and
>
> WHEREAS, H.R. 38 would authorize states attorneys general to bring federal antitrust suits for recovery of damages to the general economy; and, in either case, provides that damages not claimed by persons represented by the attorney general may be escheated or used for general welfare purposes; and

* See, e.g., United States v. Morton Salt Co., supra at 652, Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946).

WHEREAS, H.R. 38 would require the General of the United States, upon filing of an action under the antitrust laws for damages on behalf of the United States, to notify any state attorney general if he has reason to believe (a) that such state attorney general would be entitled to bring a similar action on behalf of citizens of the state;

* * * * *

BE IT RESOLVED, that the Council of the Section of Antitrust Law of the American Bar Association endorses the philosophy of devising a means whereby damages can be recovered for antitrust violations which cause individually small, but widespread, consumer harm.

BE IT FURTHER RESOLVED, that the Council of the Section of Antitrust Law of the American Bar Association opposes the enactment of H.R. 38, or any similar legislation, on the following grounds:

(a) With respect to the provision which would permit states attorneys general to recover as parens patriae on behalf of citizens, unlike Rule 23 of the Federal Rules of Civil Procedure governing class actions, there are inadequate safeguards embodied in the bill to enable a court (a) to define the class represented by the state attorney general, and (b) to determine whether the state attorney general's proceeding on behalf of such citizens is the most efficient and equitable manner to obtain the relief. Moreover, there exists the possibility of multiple recovery;

* * * *

(b) With respect to the provision which would permit a state attorney general to recover for damages to the general economy of that state (as opposed to damages to the business or property of the state), there are no criteria for determining the amount of damages to the general economy; and no court could ascertain the amount of such damages, except by speculation;

(c) With respect to the provisions of the bill which would permit a state to escheat or use for general welfare purposes damages not collected by injured citizens, the excess awarded to the state is not compensatory, acts as a penalty, and is inconsistent with the statutory scheme which provides both private actions for injury to the business or property of the plaintiff and criminal sanctions for violation of the antitrust laws;

(d) With respect to the provisions of the bill which would require the Attorney General of the United States to notify state attorneys general of actions which should be brought on behalf of citizens of the states ... there is every reason to believe that states attorneys general would independently learn of the United States Attorney General's filing of such actions without the United States Attorney General's having to make the determination, with respect to each of the 50 states: (a) whether any such state would be entitled to bring a similar action

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Title V -- Premerger Notification and Stay Amendments

Title V would make far-reaching changes in the enforcement of the antitrust laws against mergers and acquisitions. The changes go well beyond the bounds of enlightened enforcement of the antitrust laws and drastically impair the freedom to engage in lawful business transactions.

The changes that Title V would effect can be stated in four categories. While the first two can be refashioned into workable and perhaps salutary procedural rules that would aid in proper antitrust enforcement, the second two would, in the view of the Section of Antitrust Law, impose unjustifiable and untenable restraints. We deal below with each of the four categories.

A. Premerger Notification

The Section of Antitrust Law does not oppose in principle premerger notification of transactions of a kind that may offend the antitrust laws.* Although the premerger notice provisions of the bill do not add a good deal to the existing Federal Trade Commission merger notification requirements, they do include more mergers jurisdictionally, they do ensure notice reasonably prior to consummation of the transaction, and they do make the filings directly available to the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice.

We agree with the bill's premise that transactions of a value above a stated minimum should be reported. Although dollar value of the transaction is not a way to measure the validity or invalidity of a merger or acquisition, it is the best practicable test for weeding out the relatively small-sized transactions that are highly unlikely to merit antitrust attention. A reasonable minimum value for transactions within the reporting requirements would be $250 million combined sales or assets of the merging firms, when the acquiring company and the acquired stock or assets each has a minimum value of $10 million. The present bill's failure to provide a floor of this proportion would, in our view, deluge the antitrust authorities with essentially meaningless paper and immerse them in unnecessary administrative duties.

Assistant Attorney General for Antitrust Thomas E. Kauper, in testifying on May 7, 1975 before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, expressed concern that "...the bill would require notification of a variety of transactions between corporations above the stated size limits which do not appear to pose competitive issues...." Likewise, Chairman of the Federal Trade Commission Lewis A. Engman, also testifying on May 7, 1975, questioned this provision as follows:

> "If we have to conduct full investigation of all mergers exceeding the $100 million assets or sales test ... the fruits of our efforts might not be worth the cost. Our own premerger notification sets higher limits of $250 million of assets or sales and appears to be satisfactory for purposes of getting basic information on large mergers."

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* Our position in this regard marks a departure from the Section's past opposition to mandatory notification requirements, a position that had been adopted by the House of Delegates by Resolution at the 1956 Midyear Meeting.

While Title V has been amended to exempt certain transactions, such as the sale of real estate, the enumerated exemptions will not remedy the particular problem being addressed. A reporting requirement test of $250 million of combined assets and sales will permit the Department of Justice to focus its resources efficiently.

Additionally, suprise tender offers should be exempt from the notification requirements. A company planning to make a surprise tender offer should not be required to notify the antitrust authorities prior to the time within which it must notify the Securities and Exchange Commission pursuant to the Williams Act, or, if the transaction is not subject to the Williams Act, prior to the time the offer is made.

B. Waiting Period

A short waiting period sufficient to give the government time to analyze transactions subject to notification would be an aid to responsible antitrust enforcement. Thirty days would seem to be a reasonable time. However, the period should not be extended except on application to a court and a showing by the responsible government authorities that despite diligent efforts they were unable to complete their analysis and deliberations whether to sue and seek preliminary relief. At the present time, the bill allows a 45 day extension at the discretion of the authorities.

Finally, the waiting-period requirements should not apply to tender offers or to any transaction as to which one merging company shows by affidavit that such delay will cause it serious irreparable injury.

The Section of Antitrust Law also urges that the stated period should be referred to as the "notice period" prior to the merger, rather than as a "stay" period.

C. Automatic Preliminary Injunctions

Beyond the above notice periods, we strongly oppose automatic preliminary injunctions on government request. Presumably, within the notice period the government will have amassed sufficient facts to prove that it is entitled to preliminary relief, if it is so entitled. If preliminary injunctions are made automatic on mere application of the government, without any adversarial testing on the merits, large numbers of transactions neutral or beneficial from the viewpoint of competition may be deterred, and the freedom to engage in lawful transactions will be unduly restrained.

Federal Trade Commission Chairman Engman opposed an automatic stay upon application of the Commission or the Assistant Attorney General for Antitrust. Chairman Engman testified:

> Rather than mandating a court, upon application of the enforcement agency, to enter an order prohibiting consummation of a merger pending final judgment, the law should permit a court to require a showing by the government of probable illegality. Also, the court should have the discretion to permit mergers to take place upon adequate showing that the acquiring company would remain a sufficiently distinct entity to permit ready divestiture if later ordered.

D. Hold-Separate Orders and Forfeiture Provisions

The Section of Antitrust Law also opposes the provision, operative when no preliminary injunction issues, for hold-separate orders without any burden of proof being placed on the government, and the provision which would require a losing defendant to be deprived of all of the benefits of the transaction.

A hold-separate order -- although at times appropriate -- should be won or negotiated by the plaintiff in an adversarial proceeding. Additionally, the provision to deprive a violator of all the benefits of a transaction earned prior to the time it was found illegal would be counterproductive to competition, for it would dampen the acquiring firm's incentive to bolster and improve the performance of the acquired business.

Title VI -- Nolo Contendere Amendments

Title VI would provide that a plea of nolo contendere entered in a criminal proceeding under the antitrust laws will be given the same prima facie effect in subsequent civil actions as a conviction following a guilty verdict. The Section of Antitrust Law opposes enactment of Title VI, because it would impede the administration and enforcement of the antitrust laws without any meaningful compensating benefits to the treble damage plaintiffs it is intended to assist.

The availability of nolo contendere pleas, together with the civil equivalent, the consent decree, have played an important and beneficial role in the fair and efficient enforcement of the antitrust laws. For example, small companies are at times indicted together with their larger and stronger competitors. The small defendant may plead nolo simply because it cannot afford a defense. Certainly, in these circumstances, the nolo plea should not be given prima facie effect in a subsequent civil action.

Moreover, nolo pleas represent a traditional avenue for disposing of criminal antitrust cases -- as well as other criminal suits -- without the cost in time and expense of a trial when the court, in its discretion, determines that the circumstances warrant acceptance of the plea. Thus, a judge may properly believe that the public interest requires acceptance of a nolo plea in cases when the alleged offense involves debatable legal theories and economic consequences requiring a lengthy trial, particularly since any appropriate punitive measure may be imposed on the defendant after accepting the plea, just as if the defendant had pleaded guilty. This judicial role is essential to the administration of justice in the framework of a system with limited resources and capabilities.

If Title VI were enacted, however, this benefit to the public interest would be eliminated. Because there would be little incentive for a defendant to settle a criminal antitrust suit, the number of time-consuming criminal trials for antitrust violations would be considerably increased, further taxing the overburdened federal courts and the limited resources of the Antitrust Division.* Indeed, Assistant Attorney General for Antitrust Kauper testified against enactment of Title VI, on May 7, 1975, on the ground that extending the prima facie effect to nolo pleas would "severely tax" the Division's ability to bring new cases, resulting in a "waste of resources that would better be utilized in other ways."

Balanced against these benefits are the advantages allegedly accruing to the private antitrust plaintiff in more easily proving claims for which treble damages may be recovered. Affording prima facie effect to nolo pleas would not ease the burden of treble damage plaintiffs to any significant degree. Experienced antitrust lawyers would not rely on the prima facie effect of a nolo plea, because it may only cover a small portion of the alleged violations, and would thus not obviate the need

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* Between 1965 and 1974, a total of 149 criminal cases were filed, of which 120 were disposed of by nolo pleas and 26 were tried.

for extensive discovery and evidence. It is frequently unclear just what matters in an indictment "necessary to sustain a judgment of conviction" are to be given prima facie effect; and the certainty that a defendant would seek to limit the scope of such matters would further compel a prudent attorney for the plaintiff to prove independently each of the matters ostensibly given prima facie effect. Moreover, matters to be given prima facie effect relate only to the existence of the violation vel non, and have no relevance to the question of whether the violation injured the plaintiff in its "business or property" -- which is the core of any private antitrust action.

Title VII -- Miscellaneous Amendments

A. Section 701: Affecting Commerce

At the present time, the Robinson-Patman Act, including its criminal section, applies only to acts of "any person engaged in commerce, in the course of such commerce...." Section 3 of the Clayton Act (relating to exclusive dealing and tie-ins) contains a similar limitation, and Section 7 of the Clayton Act (relating to corporate acquisitions) applies only to combinations of two corporations which are both "engaged in commerce."

Section 701 of the bill would remove each of these limitations and would also nullify two recent Supreme Court decisions to the contrary.* As to the Robinson-Patman Act and Section 3 of the Clayton Act, Section 701 would expand the jurisdictional scope to acts "in or affecting commerce"; as to Section 7 of the Clayton Act, Section 701 would merely require, for jurisdictional purposes, that "the activities of either corporation (i.e., the acquiring corporation and the acquired corporation) are in or affect commerce."

This expansion of the jurisdictional scope of both these statutes is both unnecessary and inappropriate.

The Robinson-Patman Act has been the subject of extensive criticism, and sweeping changes to limit the scope, or even repeal this statute, are being proposed. At this time, therefore, it would seem particularly inappropriate to expand the jurisdictional reach of the Robinson-Patman Act (including its little-used criminal provision) until the Congress has given further consideration to its substantive provisions.

* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974) (Robinson-Patman Act); United States v. American Maintenance Industries, 45 L.Ed.2d 177 (1975) (Section 7, Clayton Act).

More broadly, the Section of Antitrust Law is unaware of any need for a radical extension of Robinson-Patman and Clayton Act jurisdiction to encompass an infinite variety of highly localized business transactions. For example, under Section 701(b), virtually every stock or assets acquisition -- no matter how trivial -- could potentially become subject to attack under Section 7 of the Clayton Act.

The absence of any need for such expanded federal jurisdiction is underscored by the vigorous antitrust programs being undertaken in a large number of the states -- with the active encouragement of the federal enforcement agencies -- to deal with local restraints on a local level. The enactment of Section 701 would give rise to serious federal/state jurisdictional questions with respect to antitrust policy and enforcement. The same acts would be subject to differing and possibly conflicting legal standards. Moreover, the extensive efforts of many states to regulate conduct solely within their boundaries might be thwarted by enactment of Section 701. Finally, the effect of these provisions would be to transfer to the federal courts -- already heavily overburdened -- a large number of private suits dealing with local restraints that more appropriately belong in the state courts.*

B. Section 702 -- Complex Cases

Section 702 would amend the Clayton Act by adding a new provision, Section 21, relating to "complex cases." It would in part provide that the district courts be given discretionary authority to designate any civil antitrust action a "complex antitrust case," and that such designation would be mandatory upon the filing of a certificate to that effect by the United States Attorney General.** The provision further provides for expedited handling of all cases designated as "complex antitrust cases." However, the proposal does not prescribe any order of priority for various categories of civil litigation, and does not take into account the current emphasis on the orderly and prompt disposition of criminal cases. Clearly the problems of priority and expedition of cases are best left to the sound discretion of the district courts under the guidance of the Judicial Conference.

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* Section 701 would also enlarge the jurisdictional scope of Section 6 of the Sherman Act, providing for forfeiture of property which is the subject of a violation of Section 1 of the Sherman Act. Section 6 has rarely, if ever, been invoked by the Department of Justice. Here too, we are unaware of any need for increasing the jurisdictional reach of this remedy.

** The proposal does not indicate whether the Attorney General could file such a certificate in a case in which the United States is not a party.

Section 702 also would authorize district courts to appoint "special masters, economic experts, and other personnel" to assist the courts in the trial of complex antitrust cases. But the district courts already have the authority to appoint masters and experts.* Accordingly, the need for additional statutory provisions is questionable; but enactment of Section 702 might be construed as overruling a large body of precedent dealing with the delegation of judicial power and invasion of the province of the jury.

Serious problems are also raised by the ambiguous provisions of sub-parts (1) through (5) of subparagraph (b) of 702. Under these provisions, a special master, economic expert, or other person may both provide evidence (sub-part 2) and act in a quasi-adjudicative role (sub-parts 3 and 4) in the same case. This proposed dual function raises serious legal and ethical questions. Finally, under this provision, the appointed court assistants could act "in all phases of the trial." This phrase makes it necessary to add some legislative clarification of their role in cases in which a jury is demanded.

In any event, we are unaware of any need -- compeling or otherwise -- for either aspect of Section 702, and at the very least a thorough inquiry is essential to consider its likely ramifications, as well as whether the present discretionary power of the federal courts requires any legislative assistance.

C. Section 703 -- Foreign Actions

The provision would permit entry of a default judgment against a party if the party or any person "in privity" with the party fails to make discovery or furnish evidence "on the ground that a foreign statute, order, regulation, decree, or other law prohibits compliance with such order...."

A federal court already possesses ample authority to deal with the situation in which a party is responsible for the failure of someone under the party's control to comply with a lawful order of the court. But Section 703 goes considerably further. It would make the party responsible for the actions of any person "in privity" with the party. The concept of "privity" is a very broad one; it goes substantially beyond control, and for this reason is inappropriate in this legislation.

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* See, e.g., Rule 53, F.R.C.P.

A more fundamental defect is that Section 703 would appear to undercut the doctrines of sovereign immunity and act of state, and to set aside the general considerations of comity which are traditionally used in deciding issues addressed by Section 703.* Any legislation permitting, in effect, a default judgment for failure to make discovery or furnish evidence which is forbidden by foreign law, necessarily encroaches on both the conduct of foreign relations and application of international law. Under the Constitution the former is the province of the executive and the latter a matter for the judiciary. To the extent that Section 703 in any given instance permits a judgment which conflicts with the foreign policy of the United States, or violates international law, it would appear to be unconstitutional.

The specific problem addressed by Section 703 is a delicate one which has been the subject of little litigation. When the problem has arisen, the courts appear properly to have taken into consideration the submissions of the Department of State, and have arrived at practical solutions based upon a balancing of conflicting interest.** Section 703 would appear to permit a dismissal on facts which would not justify such action under the case law. Such a result might well be unconstitutional. On the other hand, if the provisions of Section 703 are not construed to permit a dismissal under such circumstances, it is largely superfluous.

The Section of Antitrust Law submits that the complex interplay of the interests of the parties to the litigation and the considerations of foreign policy and comity make the subject matter of proposed Section 703 particularly inappropriate for simplistic statutory solutions.

D. Section 704 -- Attempts to Monopolize

Section 2 of the Sherman Act has not been amended in substance since 1890. Yet, without having had any hearings on the matter, the Anti-Monopoly Subcommittee has suddenly proposed to the full Senate Judiciary Committee that Congress should make a drastic revision in this fundamental antitrust law which would have a chilling effect on competition. Moreover, Section 704 is the most significant change proposed in Title VII and one of the most drastic proposals in the entire bill.

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* E.g., Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962); Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960).

** E.g., Societe Internationale v. Rogers, 357 U.S. 197 (1958).

An "attempt to monopolize" violative of the Sherman Act does not require a conspiracy. It applies to the unilateral and independent business conduct of a single firm. Experience has shown that the line between anti-competitive exclusionary conduct and the aggressive competition encouraged by the antitrust laws is often most difficult to draw -- consider for example price reductions designed to obtain new customers or to retain old customers.

Under the present law it is almost universally held that single firm conduct -- which frequently is pro-competitive and beneficial to the consumer -- does not constitute an "attempt to monopolize" unless the exclusionary conduct is accompanied by: (i) a specific intent to monopolize; (ii) in a relevant market (product market and geographic market); and (iii) a dangerous probability of success in achieving a monopoly in that market. As the Supreme Court has pointed out, "[w]ithout a definition of the market there is no way to measure ... ability to lessen or destroy competition."* And requiring proof of a dangerous probability of successfully monopolizing a specific market is consistent with the well established principles that one cannot be guilty of attempting that which itself is not proscribed, and that no one can be guilty of attempting to do that which there is no likelihood of accomplishing.

Section 704 would eliminate the second and third elements of the present requirements for finding an unlawful attempt to monopolize. If those two requirements are eliminated, we question what is left of the offense, for it has been the three elements taken together which constitute the gist of the violation. However, if a cognizable offense would remain, Section 2 of the Sherman Act would have been converted into a kind of "unfair competition" statute enforceable by any competitor without regard to considerations of public interest, and without the necessity of proving conspiracy, relevant market, or dangerous probability of success. In such circumstances, particularly since specific intent may be provable circumstantially, it would scarcely be surprising if "attempt to monopolize" did not swallow up other antitrust prohibitions as well.

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* Walker Process Equip. Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177-78 (1965); See American Tobacco Co. v. United States, 328 U.S. 781, 785 (1946); Swift & Co. v. United States, 196 U.S. 375, 396 (1905).

The potential consequences are enormous. A competitor's effort to divert or keep business is the very essence of competition and the free enterprise system. Yet almost any such effort -- whether a price reduction or a promotional campaign -- could be attacked as an "attempt to monopolize" subject not only to treble-damage judgments, but criminal penalities as well. Furthermore, without any necessity of proving dangerous probability of monopolizing, the "attempt to monopolize" prohibition could be used, perhaps most effectively, by large firms against aggressive effots of smaller competitors and new entrants to improve their position.

Such a fundamental change in Section 2 would be especially anomalous in view of Congress' amendment to the Sherman Act just last December to provide that a violation of the Act constitutes a felony punishable by imprisonment of up to three years and a fine of up to a million dollars. It would be likewise anomalous to enact such an "unfair competition" statute to curb competition by single firms at the very time that Congress is considering modification of the Robinson-Patman Act in order to encourage competition.

The implications of Section 704 -- and the mischief it would create -- have simply not been thought through. The provision should be eliminated from the bill.

E. Section 705 -- Attorneys' Fees

This provision would permit an award of attorneys' fees (now permitted in private antitrust actions to recover treble damages) to private injunction cases. The provision directs that the court "shall" award attorneys' fees where the plaintiff "substantially prevails."

There may well be some injunction cases in which an award of attorney's fees would be appropriate. However, because of the ambiguity of the term "substantially prevails," and because of the wide variety of factual situations which may be presented, we doubt the propriety of a mandatory requirement. Instead, it is recommended that the words "shall award" be changed to "may award in its discretion."

CONCLUSION

For the reasons stated herein, the Council of the Antitrust Section of the American Bar Association opposes passage of S.1284 in its present form, or any similar legislation, and recommends its adoption only after the modifications and deletions discussed herein have been made. These recommendations were approved by the Council of the Section of Antitrust Law at its meeting on August 15, 1975.

Respectfully submitted,

C. Brien Dillon
Chairman
Section of Antitrust Law

September 9, 1975

THE VOICE OF SMALL BUSINESS

N S B

NATIONAL SMALL BUSINESS
A S S O C I A T I O N
Jefferson Building • 1225 Nineteenth St.,N.W.
Washington, D.C. 20036 • Telephone (202) 296-7400

March 3, 1976

The Hon. James Eastland
Chairman, Senate Judiciary Committee
2226 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

We appreciated very much the friendly consideration you gave National Small Business Association's testimony on Tuesday, March 2, on S. 1284.

We recognize there will be some procedural improvements to be considered in your mark-up sessions on S. 1284. However, the future of small business rides on strong antitrust laws and their enforcement, and we do not believe the substance and thrust of S. 1284 should be cut out for spurious reasons.

Further, we believe that there should be no misuse of the antitrust laws to hurt small business. For that reason, we particularly urge that an exemption for small business be written into Title IV. (Please see pages 2-3-4 of our enclosed testimony of March 2.)

Sincerely,

Milton D. Stewart

Milton D. Stewart
President

cc: Hon. John L. McClellan
✓Hon. Philip A. Hart
Hon. Edward M. Kennedy
Hon. Birch Baye
Hon. Quentin N. Burdick
Hon. Robert C. Byrd
Hon. John V. Tunney
Hon. James Abourezk
Hon. Roman L.Hruska
Hon. Hiram L. Fong
Hon. Hugh Scott
Hon. Strom Thurmond
Hon. Charles Mathias
Hon. William L. Scott

CELANESE

OFFICE OF THE VICE CHAIRMAN

March 2, 1976

Hon. James O. Eastland
Chairman
Committee on the Judiciary
Room 2226, Dirksen Senate
Office Building
Washington, D.C. 20510

Re: S. 1284 (the "Antitrust Improvements Act of 1975")

Dear Senator Eastland:

I am writing to you on behalf of Celanese Corporation concerning the above proposed legislation. Celanese is engaged in the manufacture and sale throughout the world of fibers, chemicals and plastic products. Our annual sales are $1.9 billion and we employ 38,000 persons throughout the world.

We do not generally comment with respect to proposed legislation, but feel that we have an obligation to comment with respect to S. 1284, since the Bill is far-reaching in its scope and will, if enacted, have a substantial impact upon the application of the antitrust laws. We support portions of the Bill, but believe that other portions of the Bill are inappropriate and should be revised or deleted.

Title I outlines certain "findings" of Congress upon which the Act is premised. We submit that many of the findings are actually assumptions which may not be correct.

We question whether sufficient inquiry has been made concerning the relationship between

oligopoly and competition, and between present levels of competition and the problems of inflation and unemployment to support the findings contained in Title I. We believe that a thorough inquiry might cause the Congress to conclude that there is intense competition in many concentrated industries and that factors unrelated to industry structure and competitive behavior contribute to inflation and unemployment.

We suggest that Title I be revised to state simply that the purpose of the act is to help further assure that the national policy of free, open and vigorous competition will be preserved.

We generally support Title II which grants broader antitrust investigative authority to the Department of Justice and should enable it to enforce the antitrust laws more effectively. We would, however, suggest one specific change, - namely that in those cases in which an antitrust investigator wishes to examine an individual that the investigator be required to give reasonable written notice of such examination to each party under investigation and permit such party, and counsel, to be present, have an opportunity to cross-examine and obtain a copy of the transcript of the testimony. In the absence of such a change, the Bill will permit antitrust investigators to keep parties in the dark during the investigatory stage concerning the testimony which may support the potential allegation of violation of law. Fairness requires that a party understand the potential allegation, so that he may have the opportunity to explain why the allegation has no factual basis, negotiate a settlement prior to litigation with some appreciation of the relative strengths of the Department of Justice's position, or prepare an appropriate defense.

We generally support Title III which provides increased penalties for failure to obey special orders or subpoenas of the Federal Trade Commission, but question whether it is fair or appropriate (i) to establish a minimum penalty of $1,000 per day, and (ii) to start the running of the penalty period

fifteen days after notice by the Federal Trade Commission of default in filing the report or obeying the order.

The increase in the penalty from $100 per day to a maximum of $5,000 per day should furnish additional incentive to comply with FTC special orders or subpoenas. Inclusion of the minimum penalty will work a hardship in those cases (however small in number) in which there is a reasonable explanation for failure to comply. We recommend that the minimum penalty be deleted and that the courts be permitted to exercise judgment as to the penalty in each case, not to exceed a maximum of $5,000 per day.

Title III would start the penalty period running fifteen days after notice by the Federal Trade Commission of default in filing the report or obeying the order, subject only to the right of a party to obtain a court order staying the accumulation of penalties upon demonstrating a substantial probability of ultimate success on the merits, irreparable damage, and that the equities clearly favor a stay. It will be extremely difficult for any party to satisfy the burden of proof necessary to stay the accumulation of penalties. Under such circumstances, faced with mounting penalties, a party will have no practical choice but to comply.

We strongly oppose Title IV, the parens patriae section, which permits State attorneys general to file antitrust actions on behalf of citizens and the general economies of their States and introduces the "fluidized recovery" concept in all class actions under the antitrust laws. The provision which permits suits for damage to the "general economy" is completely inconsistent with prior legislation and case law which permits treble damage actions only by those who have been injured in their "property". The House of Representatives wisely eliminated suits for damage to the "general economy" from H.R. 8532. The courts will struggle without success to determine the appropriate metes and bounds of "general economy" and will ultimately impose arbitrary judgments whenever

they ignore a traditional requirement of injury to property.

The authorization of damages without the necessity of proving injury in effect converts the nature of the recovery from damages to fines. These would be collected from defendants even in those cases in which the court would have no idea as to the distribution to be made of the funds.

It must be emphasized that the "fluidized recovery" approach of Title IV, as presently worded, will apply to all antitrust class actions, whether or not initiated by a State attorney general. It can be predicated that there will be countless unfounded antitrust class actions instituted by parties who hope to obtain a quick settlement from defendants who cannot risk the possibility of having to pay enormous damages which are not calculated on the basis of injury. The Bill may ultimately serve to force some businesses to liquidate and thereby increase the unemployment in the country. The section will not serve to fight inflation, but will instead increase the likelihood of inflation by forcing the settlement of unfounded actions, with the cost thereof to be passed on to the consumer.

Title V, the premerger notification section, would require parties of relatively modest size to delay the consummation of a merger during the required notification and waiting period and will permit either enforcement agency to block such merger during the notification and waiting period by commencing a proceeding or action during such period and certifying to the district court "that it or he believes that the public interest requires relief pendente lite . . .". These provisions depart radically from present law which does not automatically delay mergers and which requires that the enforcement agency obtain a court order if it wishes to enjoin consummation of the merger.

The requirement that all mergers of the size described in the Bill be delayed during a waiting period overlooks the fact that most mergers are lawful under the antimerger statute and that the

government agencies only attack mergers in a small number of cases. An arbitrary waiting period will inhibit the free flow of capital in a somewhat depressed economy by deterring lawful mergers.

The provision which enables an enforcement agency to obtain an injunction during litigation by certifying to the district court that it or he believes "that the public interest requires relief pendente lite" substitutes for the reasoned judgment of a court the belief of the enforcement agency. It will result in the enjoining of many mergers which courts would not enjoin. As a practical matter, many mergers which are lawful and would otherwise take place will be abandoned when an injunction is isssued on the basis of the belief of the enforcement agency. Rather than engage in extensive litigation to determine whether they can consummate a merger which has been enjoined pendente lite, most companies (particularly small companies) will decide to devote their energies to other matters and abandon the merger. Does it make sense to give companies an incentive to abandon lawful mergers merely because the enforcment agency believes that the public interest requires relief pendente lite?

Title V requires the court to enter an order requiring the acquiring person or persons to maintain the personnel, assets, stock or acquired firm as a separate entity pending the outcome of an FTC proceeding or Justice Department action with respect to the legality of the acquisition under Section 7 of the Clayton Act or Sections 1 or 2 of the Sherman Act. Courts presently have the authority to order such separation of the acquired firm in appropriate cases. We question, however, whether separation should be mandated by law and suggest that the present more flexible approach be retained.

Title V also requires the court, to the extent practicable, to deprive the violator of all benefits of the unlawful merger. The provision may engender "holding pattern" operations during litigation and

be anticompetitive in nature.

We agree with the views of the Justice Department expressed to you by Thomas Kauper in opposition to the provisions of Title VI which would allow a plea of nolo contendere in an antitrust proceeding to be used as prima facie evidence in subsequent private treble damage actions.

Section 703 of Title VII provides that in any action involving any act to regulate interstate or foreign trade or commerce, or to protect the same against unlawful restraints or monopolies, in which the court orders any party, or person in privity thereto, to furnish discovery, evidence or documents, and such party or person refuses on the ground that foreign law prohibits compliance with such order, the court may dismiss all or some of such party's claims or defenses or otherwise terminate the proceeding or any portion thereof adversely to such party. This provision appears to constitute a reaction to foreign statutes which prohibit disclosure of information or documents. If there is a quarrel with the foreign law, the appropriate course to effectuate change is through discussion at the political or enforcement levels. Nothing is accomplished by victimizing a party who cannot furnish evidence or documents by reason of a foreign law which prohibits the furnishing of such evidence or documents. We respectfully recommend that the provision be deleted.

We are unaware of the status of the amendment to S. 1284 which was proposed by Senator Bayh. In the event the amendment is still being considered, we wish to object strenuously to the proposal that any corporation guilty of a Sherman Act violation forfeit to the United States Treasury 20% of its gross revenues during the period of such violation. This proposal is confiscatory in nature, may well be unconstitutional, and goes far beyond any penalty which is appropriate to assure adherence to the antitrust laws.

Very truly yours,

Peter H. Conze

STATEMENT OF THE UNITED STATES INDUSTRIAL COUNCIL FOR THE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY OF THE SENATE JUDICIARY COMMITTEE ON S. 1284 THE ANTITRUST IMPROVEMENTS ACT OF 1975

Introduction

The United States Industrial Council, a national business association with headquarters in Nashville, Tennessee, welcomes this opportunity to be heard on this important piece of legislation. The Council, with over four thousand members nationwide, employing over three million people, is broadly representative of the American business community and has been an active spokesman for that community for many years.

The USIC firmly believes in a strong free enterprise system, based on open competition. However, it has the gravest doubts as to whether the proposed Antitrust Improvements Act is either an appropriate or an effective means toward achieving this end.

Essentially, the Council fears that the proposed Act will serve only as yet another vehicle for the harassment of private enterprise by government. As such, it will serve neither the interests of the business community nor the consumers. Rather, it will increase the operating costs of business (with resulting higher prices for consumers) and deprive the consumers, in many instances, of the real and substantial benefits that may accrue from the legitimate utilization of the economies of scale by private

enterprise.

Contrary to what appears to be the philosophical thrust of this bill, there is much to be said in favor of the natural growth and concentration of industry, and much to be said against arbitrary and unreasonable interference with such development. Where concentration is the inevitable result of technological advances, greater efficiency, increased production and lower prices, it is difficult to see how the consumer interest is served by official efforts to halt or to reverse the trend. Furthermore, the number of firms in a given industry reveals nothing about the degree of competition that exists in that industry. Nor is there conclusive evidence that increased concentration inevitably leads to collusion or higher prices.[1/]

The USIC regards the existing antitrust laws as being more than adequate to protect both public and private interests against authentic conspiracies in restraint of trade and other illegal trade practices. It regards the current bill as an attempt by government to convert the antitrust laws from the self-defense mechanism for free enterprise that they were originally conceived to be, into an administrative bludgeon with which to exert further regulatory control over private business.

For these reasons, enlarged and expanded upon in the ensuing paragraphs, the United States Industrial Council respectfully opposes the passage of the Antitrust Improvement Act of 1975.

I. The Declaration of Policy set forth in Title I of the proposed Act, which purports to justify its provisions on the grounds of public necessity, is open to question in each of its leading assumptions.

First of all, the Declaration of Policy set forth in Title I acknowledges the crucial role played by state and federal regulatory policies in undermining free competition. But it is apparently assumed, however, that the answer to this problem is to impose further controls on private business.

Surely the obvious solution lies not in additional antitrust restraints but in less regulation. It is unclear how the proposed Act will do anything to eliminate the price fixing, market division, and restraint of trade that is carried on with perfect impunity throught the present scheme of regulation. On the other hand, the removal of many of these controls will do much to foster genuine competition.

Certainly the opinion of the Chairman of the Federal Trade Commission suggests that this would be the likely result:

> "Most regulated industries have become federal protectorates living in the cozy world of 'cost plus,' safely protected from the ugly specters of competition, efficiency, and innovation.
>
> "There are those who hold the businessman to be so unprincipled and greedy that they regard any governmental interference with his free movement as an addition to the social welfare. Experience would seem to contradict that point of view.
>
> "In point of fact, the effect of Government interference frequently has been to remove the one thing that stood in the way of the antisocial exercise of greed. I am referring to competition. Meanwhile, the scheme of regulation has proven at least as susceptible to the lure of protectionism as the private interests it replaced." 2/

Regulation has itself become a "barrier to entry" for would-be competitors in many cases. The removal of regulatory restrictions would increase competition by making it possible. It would therefore seem that regulatory reform is a far more appropriate subject for congressional action at this time.

Secondly, the Declaration suggests that increased industrial concentration has resulted in diminished competition and higher prices. There is considerable evidence to contradict this assumption.

As pointed out in the Introduction, the number of firms in a given industry reveals nothing about the degree of competition in that industry. In the case of automobiles, for example, observers have noted that while the auto industry is dominated by its four largest companies, not only do these companies compete vigorously with each other, but they face additional

competition from foreign imports and used cars. This, of course, is not even to mention the competition that the industry as a whole must face from railroads, buses, and airplanes as alternative modes of transportation. 3/

The bill's assumptions are also undermined by a recent American Enterprise Institute study of industrial concentration. This study concludes as follows:

> "Both theoretical and empirical evidence relating industrial concentration to inflation have been examined. The theoretical arguments were that concentration promotes inflation because it allows sellers to maintain prices when demand declines, to pass on inflationary wage increases, and to avoid competitive pressures to reduce costs. These arguments were found to be inconsistent with the evidence, which showed that prices and labor unit costs have increased more slowly in concentrated industries than in other industries. The main reason for the superior performance of firms in concentrated industries has been their greater gains in productivity. This finding suggests that the managers for these firms have been far more successful in instituting cost-saving techniques of production.
>
> "This explanation for the difference in performance may be taken one step further: the expanded output of concentrated industries permits economies of scale in production. Firms in concentrated industries become more efficient as they grow larger. This explanation has important implications for the potential effects of deconcentration. Most important, the splitting up of large firms will reduce the overall growth of productivity in the economy because the newly created firms will be less efficient. Deconcentration will therefore reduce the growth of real income, and may even increase the rate of inflation as lower productivity generates higher prices." 4/

Thirdly, the Declaration assumes that "vigorous and effective enforcement of the antitrust laws, and the reduction of monopoly and oligopoly power in the economy, can contribute significantly to reducing prices, unemployment, and inflation."

This assumption is likewise open to question. The potential adverse effects of deconcentration have already been alluded to above. Furthermore, not only would a strenuous antitrust policy be likely to deprive consumers of the benefits of economies of scale in many cases, but the overzealous

application of existing antitrust laws has already done so, notably in the celebrated Brown Shoe case of 1962.

In Brown Shoe, the Supreme Court struck down a merger between the Brown Shoe Company and the G. R. Kinney Co. (both of which were manufacturers and retailers of shoes) on grounds that the merger would tend "substantially to lessen competition" in violation of the Clayton Antitrust Act.

At that time, Brown accounted for only 4 percent of the shoe manufacturing market in the United States, and 6 percent of the retail market. Kinney accounted for 0.5 percent and 6 percent respectively. Nevertheless, the Court concluded that, on the basis of the existing structure of the national shoe market, the merger of these two companies would give them a significant advantage over smaller companies. Delivering the Opinion of the Court, Chief Justice Earl Warren declared:

> "Of course, some of the results of large integrated or chain operations are beneficial to consumers, Their expansion is not rendered unlawful by the mere fact that the small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. We cannot fail to recognize Congress's desire to promote competition through the protection of viable small locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision." 5/

In other words, the Court concluded that the consumers must be denied the lower prices that would result from the merger because of Congress's insistence on deconcentration. The fact that existing antitrust laws have had this effect should certainly cause the Congress to consider well before enacting even more rigorous legislation in this area.

II. Titles II and III of the proposed Act constitute unwarranted extensions of federal power.

Title II amends the Antitrust Civil Process Act of 1962, which gives

the Attorney General broad powers to subpoena documentary evidence relevant to a civil antitrust investigation. It not only extends that power to demand oral or written answers to interrogatories, but it extends the scope of such investigations to cover natural persons (in addition to legal entities) who are or who have been engaged in "any activities preparatory to a merger, acquisition, joint venture, or similar transaction, which may lead to any antitrust violation." (emphasis supplied)

The Council is opposed to any such extension of federal power because of the threat it poses to individual privacy and the opportunities it affords for abuse.

The Council is also opposed to Title III, which drastically increases the financial penalties for noncompliance with requirements to file reports with the Federal Trade Commission. Not only is the constitutionality of such "line of business" reports currently being challenged through our judicial system, but the utility of the reports themselves has been called into question by authorities both within government and without. Other federal agencies, it is reported, consider the data obtained by this method to be useless.[6/] What is worse, the cost of complying with these reports runs into millions of dollars and will serve only to increase prices by increasing the operating costs of business.[7/]

III. Title IV of the proposed Act would unleash a torrent of spurious antitrust actions, the cost of which would ultimately be borne by the very consumers who are supposed to be benefited thereby.

Title IV, which empowers state attorneys general "or any other persons authorized by law" to bring civil antitrust actions for injuries to the "general economy" of a state, is by far the most pernicious and potentially destructive section of the proposed Act.

The opportunities for abuse are obvious. Ambitious attorneys general

could use it for the purpose of political grandstanding, while private attorneys might find it profitable in other ways. Under this section there is nothing to prevent the states from hiring private attorneys on a contingent fee basis for the purpose of bringing antitrust actions, and nothing to prevent those attorneys from filing one harassing lawsuit after another. Such lawsuits, in turn, would be far more likely to benefit the attorneys involved than the consuming public on whose behalf they were ostensibly brought, Not only would the compensation paid to the individual citizen be minimal under such a system, but it would almost certainly be outweighed by the higher prices that would be necessary to meet the staggering costs of all this litigation.

The enormity of these costs might well cause some companies to seek a settlement out of court. But what of the merits of such actions themselves?

It should be remembered that the civil remedies under the antitrust laws were fashioned with two objectives in mind: first, to compensate those individual persons who had sustained real damages as a proximate result of antitrust violations; and second, to deter would-be violators by allowing the injured persons to recover treble damages. This approach effectively allowed the injured persons to act as "private attorneys general"[8/] in enforcing the antitrust laws. What is more, it was established at a very early stage that such persons included the states in their proprietary capacities as individual consumers.[9/] Given the comprehensive relief already available, it is uncertain as to why the states must be permitted to sue for treble damages in their quasi-sovereign capacities for what are alleged to be injuries to their general economic well-being. In fact, it is difficult to conceive of how injuries to the "general economy" of a state are to be measured for the purpose of assessing damages.

An article published in the Northwestern University Law Review suggests the difficulties inherent in attempting to make such calculations:

> "[O]ne might well inquire how a state could conceivably prove the dollar value of damages to its sovereign interests....Even assuming that the effect of the alleged conspiracy is discriminatory (so that prices in the State for a particular product are raised to a level higher than the level prevailing in other States), it is still unclear how the State's economy as a whole has been injured. The fact that prices for particular goods and services are higher does not, as a matter of inexorable economics, retard State economic growth. To the contrary, inflation is often accompanied by increased economic activity. 10/

The opinions of the Supreme Court, on the two occasions when it has considered the issue, are likewise informative on this point. On the first of these occasions, in the landmark case of Georgia v. Pennsylvania Railroad, 11/ the high Court upheld the right of a state, in its quasi-sovereign capacity as parens patriae, to bring suit for an injunction under the antitrust laws. In this case, Georgia alleged that the defendants, several interstate railroad companies, had conspired to fix their rates so as to discriminate against the state as a whole. After allowing the action, however, the Court appointed a special master to determine whether the general economy of the state had actually been injured. After detailed proceedings, the Court approved a master's report recommending that the complaint be dismissed on its merits. 12/ Thus, while the Georgia case established the right of a state to sue for injunctive relief as parens patriae, it also serves to illustrate the difficulty of proving real damages in that capacity.

On the second occasion, the Court dealt even more directly with the issues posed by the present bill. In the case of Hawaii v. Standard Oil Company, 13/ the Court considered a treble damage suit by the State of Hawaii, as parens patriae, against several leading oil companies for allegedly conspiring to fix the price of gasoline in that state. Dismissing the action,

the Court ruled that Georgia established the right of a state to seek injunctive relief only. It did not allow for treble damage suits, and the Court found no authority to extend the concept of parens patriae that far.

Delivering the Opinion of the Court, Justice Marshall noted that Congress could have compelled antitrust violators to compensate federal, state, and local governments for the estimated damages to their respective economies caused by the violations. Instead, it chose to allow all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. The Justice wryly added that since a successful antitrust damage suit recovers not only the costs of the litigation but also the attorney's fees, there should be "no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits." 14/

On the other hand, allowing the states to sue for damages to their general economies in addition to the forms of private action already available could work a considerable injustice. The Justice observed that Section 4 of the Clayton Act

> "permits Hawaii to sue in its proprietary capacity for three times the damages it has suffered from respondents' alleged antitrust violations. This section gives the same right to every citizen of Hawaii with respect to any damage to business or property. Were we, in addition, to hold that Congress authorized the State to recover damages for injury to its general economy, we would open the door to duplicative recoveries." 15/ (emphasis supplied)

Significantly, the Justice concluded that

> "A large and ultimately indeterminable part of the injury to the 'general economy,' as it is measured by economists, is no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves under §4. Even the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State." 16/

Title IV of the proposed Act does not resolve this problem in a satisfactory manner. To be sure, it provides that "the final judgement in the [state] action shall be res judicata as to any claim under Section 4 of this Act by any person in respect of damage to whom such action was brought." But at the same time it allows "any person" to "exclude from adjudication" in the state action in favor of initiating an action of his own.

The practical effect of this provision is not likely to be very different from allowing double recovery. Any person who feels that he has sustained a greater than "average" injury can withdraw from the state action and commence his own treble damage suit; the state action itself will provide him with the ammunition to do so.

The difficulties that would result from such a situation may easily be imagined.

IV. Title V of the proposed Act gives the Federal Trade Commission and the Justice Department unreasonable powers to compel prenotification of pending mergers and to delay them.

Title V not only expands existing prenotification requirements for pending mergers but, by drastically expanding the power of the Federal Trade Commission or the Justice Department to delay mergers, it may very nearly have given these agencies the power to stop them altogether. Given the complexity and rapidly changing nature of the business world today, multi-million dollar transactions simply cannot be left dangling while their desirability is debated by federal agancies.[17/] And desirability (at least from the standpoint of federal officialdom) is the correct word.

It will be noted that it is possible under this bill for either the FTC or the Justice Department to delay (and thus possibly kill outright) any pending merger simply by demanding additional information. It is not necessary even to allege any illegality.

Failing this, of course, the bill makes it an easy matter to

postpone a merger indefinitely through a court order. For this, a mere allegation will suffice. There is no requirement that the illegality of the merger must be established first.

Over a decade ago, a leading authority on antitrust law, Professor Sylvester Petro, warned that the increasingly aggressive application of the Sherman and Clayton Acts by the government would have serious political and economic consequences. Professor Petro's warning is worth repeating here:

> "There is a serious question whether free enterprise can survive this kind of government dictation of the size, shape, structure, and mode of operation of the economy. Pricing policies, marketing procedures, and capital arrangements and rearrangements are the essence of our system. When these matters are controlled by the decisions of administrative agencies and judges, rather than by men staking their fortunes on their ability to serve the consumers, the result is the corporative state. Antitrust principles are now being pursued to the bitter end. Had they been pushed so far at the start, the economy would have been frozen in a relatively primitive cast--no General Motors, no General Electric, no U.S. Steel, and beyond much doubt, nowhere near the technological progress, the wages, or the standard of living that now prevails. This prospect should induce a pause for reflection." 18/

Title V of this bill represents yet another step toward the corporative state.

V. Title VI of the proposed Act will impair rather than improve the effective enforcement of the antitrust laws.

Title VI, which effectively transforms a plea of nolo contendere by a defendant in an official antitrust proceeding into an admission of guilt for the benefit of plaintiffs in ensuing private damage suits, will serve only to prolong cases that might otherwise be settled early, and to tie up government lawyers who might be more profitably engaged in investigating additional violations.

As the law now stands, allowing a plea of nolo contendere for the

purpose of obtaining a settlement can be an effective and economical way of enforcing the antitrust laws. As one authority has pointed out:

> "Since most big trials can be spun out by one procedural device or another and appeals up to the Supreme Court are common, it is rare for the interval between the Government's original complaint and the court's final decree in a contested suit to be less than three years; often it is more than five. So the consent settlement gives the Government the advantage of achieving a quicker result. Both sides are often glad to avoid the expense of protracted litigation; companies have a duty to their shareholders to avoid unnecessary legal expense and the Department of Justice has a limited budget. The industry may have a further important advantage. As in the case of a nolo contendere plea in a criminal suit, a consent settlement avoids the deployment of all the evidence in a case in open court and the consent decree itself is not admissible as evidence in a private treble-damage suit. Consequently the consent decree may be a way of avoiding publicity and the risk of expensive private litigation when the Government's case is finished....In view of the saving of the expense of litigation and in view of the protection against treble-damage suits which is obtained, there may be a temptation to consent to more drastic forms of relief than the courts would impose." 19/

Given the additional fact that the government may presently refuse to accept a nolo contendere plea where violations are flagrant, it is difficult to see what benefits, if any, would be derived from destroying the utility of the plea altogether.

VI. Conclusion

In conclusion, the Council reaffirms its conviction that the best method of increasing competition is by reducing the number of existing government controls, not by adding even more comprehensive controls. The Council believes that Congress has greatly underestimated both the vitality that remains in our free enterprise system, and the extent to which greater economic freedom could serve the public interest far more effectively than the most minute and

complicated scheme of regulation. To quote once more from Professor Petro:

> "The ardent antitruster, like the good-faith and kindly socialist, tends to overlook and to undervalue the amazing structural and functional checks that a free society interposes against true monopoly power and abuse. He sincerely believes that it is open to any strong firm to engage in price wars until weaker competitors are licked, and then to reap in peace and comfort the fruits of its aggression, in the form of monopolistic profits. This was supposed to happen when the big chains went into operation in the field of retail distribution. But what has actually happened? The big chains find, possibly to their amazement, that independent stores continue to operate; moreover, and possibly still more amazing, they find themselves confronted with the competition of equally strong and well-financed retail chains." 20/

Public policy on economic affairs stands today at a crossroads. Existing regulations, it is being increasingly recognized, have frequently proved to be useless at best, and counterproductive at worst. In response to this situation, we can either continue to heap control on control and restraint on restraint, or else we can work toward reducing the role of government in the economy in favor of allowing the natural checks and balances of the marketplace to reassert themselves.

We choose the former alternative at our peril. Where economic freedom is stifled by government restrictions, political freedom may not long survive.

To enact this bill into law would be to take a giant step toward central economic planning. Its effect could easily be to allow the government to shape and mold American industries almost at will.

Some years ago, during his tenure as Dean of the University of Chicago Law School, Attorney General Edward H. Levi--himself a leading expert on the antitrust laws--declared that "It is becoming much more difficult to understand what is meant by the nonregulatory character of the antitrust laws." 21/

Concerned over this trend toward using antitrust enforcement to regulate the economy, Dean Levi recommended that "we pause before a law which has symbolized free enterprise is converted into but another congeries of statutes for the control of business."[22/]

The United States Industrial Council respectfully makes this same recommendation to Congress with regard to the Antitrust Improvements Act of 1975.

FOOTNOTES

1/ Harold Demsetz, The Market Concentration Doctrine, American Enterprise Institute, 1973, p. 26.

2/ Speech by Lewis D. Engman in Detroit on October 7, 1974, before the Financial Analysis Federation. (Reprinted in U.S. News and World Report, November 4, 1974, p. 81).

3/ Schmidt, Emerson P., Union Power and the Public Interest (Los Angeles: Nash Publishing Co., 1973), p. 163.

4/ Steven Lustgarten, Industrial Concentration and Inflation, American Enterprise Institute, 1975, p. 36.

5/ Brown Shoe Co. v. U.S., 370 U.S. 294, 344 (1962)

6/ Shirley Scheibla, "Illegal Search and Seizure," Barron's, February 17, 1975, p. 5.

7/ George J. Benston, "The Baffling New Numbers Game at the FTC," Fortune, October 1975.

8/ State of Hawaii v. Standard Oil Co. of California et al., 405 U.S. 251, 261 (1972).

9/ Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390 (1906)

10/ "Parens Patriae Suits for Treble Damages Under the Antitrust Laws," 65 NORTHWESTERN UNIVERSITY LAW REVIEW 193, 220-221 (1970)

11/ 324 U.S. 439 (1945)

12/ 340 U.S. 889 (1950)

13/ 405 U.S. 251 (1972)

14/ Id. at 266

15/ Id. at 263, 264

16/ Id. at 264

17/ "An Antimerger Bill Raises Some Hackles," Business Week, December 8, 1975, p. 62.

18/ Sylvester Petro, "The Growing Threat of Antitrust," Fortune, November 1962, p 128.

19/ Neale, A.D., The Antitrust Laws of the U.S.A. (London: Cambridge University Press, 1970) p. 380, 381.

20/ Petro, "Antitrust" p. 198.

21/ Ibid., p. 128.

22/ Ibid., p. 128.

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HONORABLE ROMAN L HRUSKA, MEMBER OF US SENATE
209 RUSSELL SENATE OFFICE BLDG
WASHINGTON DC 20510

ROMAN L. HRUSKA
RECEIVED
FEB 13 1976
United States Senate

DEAR SENATOR HRUSKA

I UNDERSTAND THAT THE CONGRESS WILL SHORTLY VOTE ON PROPOSED LEGISLATION WHICH WOULD AUTHORIZE THE ATTORNEYS GENERAL OF THE STATES TO BRING ANTITRUST TREBLE DAMAGE ACTIONS IN THE FEDERAL COURTS ON BEHALF OF ALL OR LARGE GROUPS OF RESIDENTS OF A STATE CLAIMING DAMAGES FROM VIOLATIONS OF THE ANTITRUST LAWS.

IN THIS CONNECTION, I WISH TO STRESS THE IMPORTANCE FOR THE NATIONAL ECONOMY OF A CAREFUL ASSESSMENT AS TO HOW POTENTIALLY HUGE CONTINGENT LIABILITIES, PARTICULARLY OF SMALLER FIRMS NAMED AS CO-CONSPIRATORS IN SUCH ANTITRUST ACTIONS, MAY AFFECT THEIR ACCESS TO FINANCING AND CAPITAL MARKETS.

I UNDERSTAND THAT ANTITRUST CLASS ACTIONS IN THE PAST HAVE ASSERTED MULTI-MILLION DOLLAR CLAIMS FOR WHICH ALL NAMED CO-CONSPIRATORS ARE JOINTLY AND SEVERALLY LIABLE, INCLUDING ONE RECORDED CASE IN CALIFORNIA CLAIMING $750 MILLION IN JOINT AND SEVERAL LIABILITIES AGAINST 2000 REAL ESTATE BROKERS.

IN VIEW OF SEC DISCLOSURE REQUIREMENTS IN THE FINANCIAL STATEMENTS OF PUBLIC CORPORATIONS WHICH INCUR MATERIAL CONTINENGENT LIABILITIES IN PENDING ANTITRUST LITIGATION, IT IS MY CONSIDERED OPINION THAT SUCH ANTITRUST ACTIONS MAY HAVE A SUBSTANTIAL ADVERSE IMPACT ON THE FINANCING OPPORTUNITIES PARTICULARLY OF SMALLER FIRMS NAMED IN SUCH ACTIONS.

THIS IS SO BECAUSE BANKS AND OTHER FINANCIAL INSTITUTIONS WILL NECESSARILY TAKE SUCH SUBSTANTIAL CONTINGENT LIABILITIES INTO ACCOUNT IN THEIR LENDING DECISIONS

ALLEN P STULTS CHAIRMAN OF THE BOARD OF AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO AND FORMER PRESIDENT OF THE AMERICAN BANKERS ASSN

22:14 EST

MGMASHT HSA

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO · ILLINOIS 60637

March 3, 1976

Senator Philip A. Hart
Chairman
Senate Subcommittee on Antitrust
and Monopoly
253 Russell Senate Office Building
Washington, D.C. 20510

In re: S. 1284

Dear Senator Hart:

I am writing to express my views on S. 1284 which is pending before your subcommittee. I request that the statement which follows be made a part of the record of your subcommittee's deliberations on this bill:

My name is Richard A. Posner. I am a professor of law at the University of Chicago Law School and I have taught and written extensively in the field of antitrust law.

I believe that the enactment of S. 1284, which would allow state attorneys general to bring suits under Section 1 of the Sherman Act to recover damages for injury to the residents of their states, would be a serious mistake. It is important to provide effective damage remedies for violations of the antitrust laws; and where the injury inflicted by such a violation is widely diffused, no individual may have a substantial incentive to bring a damage action, even though the aggregate injury imposed by the violation may be very great. Because antitrust violations frequently do impose such diffuse injuries, procedural innovation is necessary if there is to be effective redress of antitrust violations. I am persuaded, however, that the most effective innovation is the modern consumer class action, which permits the aggregation of many small claims. That is not to say that the class action is free from opportunities for abuse

on the one hand, and inadequacies and insufficiencies on the other; but it seems to me the best of the available procedures. S. 1284 would be among the worst:

1. State attorneys general might file groundless antitrust suits designed for purposes of political self-aggrandizement. We must be realistic and recognize that attorneys general are politicians who have been known to use their office to advance a political career. The temptation to file a multibillion dollar suit for publicity purposes would in some cases, I fear, prove overwhelming. It is a salutary limitation on the powers of the attorney general of the United States that he is not empowered to bring money actions under the antitrust laws (other than for actual damages to the United States in its proprietary capacity). I fear, in short, that S. 1284 would turn the antitrust laws into a political football.

2. Calculating the damage to a state's residents from an antitrust violation would be fraught with uncertainty. It is difficult enough to estimate the injuries suffered by a class of individuals or firms doing business with the antitrust violator. To trace out the possible economic ramifications of the violation throughout a state's economy--which is what would be necessary in order to measure the injury to the state's residents--would strain the capacities of economic science and the judicial process, and would violate the traditional limitation of damages to those that are foreseeable.

3. The piecemeal creation of antitrust remedies is a great mistake. Congress has recently increased the public penalties for antitrust violations but has not, to my knowledge, attempted to evaluate the effects of that change in law. Nor have I seen evidence that Congress has carefully considered the effect on compliance with the antitrust laws of alternative remedies such as the consumer class action. Your subcommittee has not, to my knowledge at least, considered how S. 1284 would fit in as part of a cohesive, general system of public and private penalties. In these circumstances its enactment would be premature even if, considered alone, it did not have the two disabling disadvantages that I have identified.

Senator Philip A. Hart
March 3, 1976
Page 3

In sum, I urge you not to report favorably on S. 1284. I may add that in offering these views I am speaking as an individual and not as the representative of any group or interest.

Sincerely,

Richard Posner

Richard A. Posner

RAP/ka

cc.: Senator John L. McClellan
Senator Edward M. Kennedy
Senator John V. Tunney
Senator Birch Bayh
Senator James Abourezk
Senator Roman L. Hurska
Senator Hiram L. Fong
Senator Strom Thurmond
Senator Charles McC. Mathias, Jr.

ADDITIONAL MATERIAL RELATING TO TITLE II

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

22 JAN 1976

Honorable Peter W. Rodino, Jr.
Chairman
Subcommittee on Monopolies and Commercial Law
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Chairman Rodino:

When I appeared before your Subcommittee on Monopolies and Commercial Law to testify in support of H.R. 39, Mr. Mazzoli requested that I supply the Subcommittee with specific instances in which the Department's antitrust investigations were hindered or thwarted by the absence of investigatory authority that H.R. 39 would provide. See Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, 94th Cong., 1st Sess. 37-38 (1975).

We have reviewed our experience under the Antitrust Civil Process Act of 1962 with attorneys in our litigating sections and have compiled a representative list of investigations that have been impeded because of restrictions upon our pre-complaint authority. These case studies, which are similar in form to materials prepared for the Congress in connection with the 1962 legislation, are attached to this letter as Appendix A. As the attached examples reveal, investigatory difficulties caused by limitations on our pre-complaint authority fall into reasonably identifiable patterns that may be conveniently summarized.

The inability of the Department to issue a civil investigative demand (CID) to parties who have important information but are not under investigation has been a recurring problem, particularly in merger investigations. Under the Clayton Act, in order for the government to prove

that the effect of a merger will be substantially to lessen competition, it must demonstrate relevant geographic and product markets. Competitors, trade associations, and suppliers or customers will frequently have the market data essential to resolving these factual issues. In a variety of differing contexts, as the attached examples document, these third parties have refused to supply us with this information voluntarily.

The absence of necessary product or market data is often a determinative factor in our decision whether to file a civil complaint. Furthermore, in many merger investigations it is important that we be able to move quickly and file suit before the transaction is consummated in order to avoid problems associated with divestiture in the event we are successful in establishing the illegality of the proposal. In these situations it is especially important that the Department be able to go directly to parties that we know possess needed information even if it could be shown that the information would be available from less accessible sources.

More generally, the deposition authority that H.R. 39 would confer on the Department would contribute very significantly to our ability to make a fully informed decision whether or not to bring suit. It would be most valuable as a supplement to existing authority by permitting antitrust investigators to question corporate officials when an examination of documents has produced an inconclusive or ambiguous picture of the transaction or policy under investigation. Deposition authority, of course, may be absolutely crucial with respect to corporate policies that are pursued but are never reduced to writing.

Corporate officials may also find that depositions are less burdensome than requests for documents. Resort to oral examination to supplement written submissions would not only allow antitrust investigators to make a more informed judgment of when suit is or is not warranted, but would also facilitate far better utilization and conservation of Department resources than is possible under present law.

The Department's need for authority to take depositions may also arise in two more specific contexts. First, in some cases a company's policies as expressed in writing vary materially from practices actually followed. For example, a company frequently adopts and circulates to its executives a written directive condemning various anticompetitive practices while at the same time informally encouraging such anticompetitive conduct by exerting strong pressures upon employees to meet unrealistic sales quotas. There may also be occasions in which to protect itself a company feels compelled to assume a particular public position in writing but declines to follow that policy in reality. By authorizing the Department to obtain only written documents, restrictions in existing law create the possibility that decisions whether or not to bring suit may be based upon erroneous perceptions of the anticompetitive impact of particular business policies. The availability of deposition authority would significantly reduce this risk.

Second, deposition authority is needed when documents are simply not available for whatever reason as, for example, if they have been destroyed. The issuance of a CID is not normally the first step in our investigatory process. Antitrust investigators generally first seek to obtain information informally from industry sources, other governmental agencies, or the target company itself. However, the specific prohibition against destruction of documents, 18 U.S.C. §1505, applies only after a CID has been issued. If a business learns of an investigation before issuance of a CID and destroys incriminating documents, then an antitrust investigation may be completely thwarted. In this or other situations when documents do not exist, deposition authority may provide the only method for reconstructing the company policy or specific transactions and thus permit a meaningful investigation.

During my testimony I also indicated a continuing willingness to work with the Subcommittee and respond to whatever issues might arise with respect to H.R. 39 during the hearings. To the extent that there was a common theme in the testimony of persons opposed to H.R. 39, it was a concern that expansion of the Department's pre-complaint investigatory powers would be a unique threat to the civil liberties of business.

The enactment of H.R. 39 would confer upon the Department less comprehensive investigatory powers than are presently exercised by an increasing number of state Attorneys General (e.g., New Jersey, Illinois and Texas), numerous executive departments (e.g., Department of Labor), and many independent regulatory agencies (e.g., Securities and Exchange Commission and Federal Trade Commission). Some witnesses before the Subcommittee sought to distinguish the FTC's authority by noting the differences between its statutory mandate and the Department's. However, the FTC's powers, 15 U.S.C. §49, can be used in investigations directly analogous to those pursued by the Department. The powers conferred by H.R. 39 are thus certainly not unique. A representative list of states, departments, and agencies possessing similar investigatory authority was contained in our March 5, 1975, letter to you which may be found in the Hearings at pages 185-186. We have sought to supplement that information in Appendix B.

Even though the powers conferred by H.R. 39 are not unique, the bill contains comprehensive safeguards that protect against governmental overreaching. A recipient of a CID may seek to quash the CID in court by showing that it is oppressive, unreasonable, irrelevant, or has been issued in bad faith. A witness has the right to the presence and advice of counsel during any deposition. He may refuse to answer any question on the grounds of privilege, self-incrimination, or other lawful grounds. All refusals to answer must be honored unless the government attorney can obtain a judicial order compelling an answer. The testimony of a witness must be transcribed, and he has a right to review and correct the transcript. The witness may also obtain a copy of the transcript except in very limited circumstances.

If the Department ultimately files a civil complaint based upon information obtained pursuant to a CID, the defendant's discovery rights would be governed by the Federal Rules of Civil Procedure. Thus the rights of witnesses regarding depositions under H.R. 39 are virtually identical to witnesses deposed pursuant to the Federal Rules of Civil Procedure and substantially exceed the rights of grand jury witnesses. This is important since civil complaints have accounted for about 70% of the Department's cases in recent years.

The most peculiar argument of opponents to H.R. 39 is that representatives of all target companies should be permitted to participate in depositions and cross-examine witnesses. Such a concept is unworkable in practice, and unprecedented in concept.

As I explained in greater detail in my letter to you of November 19, 1975, it would be impossible to provide every target of an investigation with an opportunity to participate in every deposition hearing pursuant to a CID simply because all of the targets of a particular investigation are not known until substantial material and information have been obtained. It is often very difficult to determine precisely when a company becomes a target, and companies that are targeted late in the investigation will, of course have had no opportunity to participate in depositions that were taken earlier. Amendment of H.R. 39 to provide such a right would therefore raise many complex procedural and substantive problems that could only delay timely investigations.

The mere presence of representatives of target companies at depositions could itself produce counterproductive and anti-competitive consequences. When the Department investigates possible collusive conduct, many of the companies involved are competitors. Assuming they could be identified, if representatives of all targets are present during depositions, then an officer of one company may be divulging business strategies and policies not only to antitrust investigators but also to his chief business rivals. The Department is sensitive to the legitimate business interest in confidentiality of trade secrets and business practices and has therefore recommended that CIDs be specifically exempted from the Freedom of Information Act. Adoption of an adversary procedure for depositions is inconsistent with this legitimate interest. The presence of representatives of targets would also discourage third party witnesses from cooperating with antitrust investigators. An employee, customer, or supplier whose economic survival is dependent upon the target will be reluctant to divulge information if he fears retaliation.

The presence and participation of counsel for the targets at depositions of other parties would turn the investigatory process into an adversary proceeding and thereby delay and complicate every investigation. As Chief Justice Warren noted for the Supreme Court in 1960 in an analogous context, "The Federal Trade Commission could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial." Hannah v. Larche, 363 U.S. 420, 446. This applies equally well to antitrust investigations conducted by the Department of Justice.

It is important to remember that the Department's objective at the pre-complaint stage of the investigation is not to "prove" its case but rather to make an informed decision on whether or not to file a complaint. In over 80% of our investigations in which CIDs are issued, we ultimately decide not to file a case. There can be no doubt that this is preferable to filing complaints based upon sketchy or inaccurate information. If a complaint is filed, the defendant will have the right to appear and defend fully against the allegations, but the legitimate investigatory purposes of H.R. 39 would be destroyed if it required trial-type adversary procedures.

The hearings disclose a number of additional narrow objections to H.R. 39, many of which appear to be based upon a misunderstanding of Departmental policy, the mechanics of an antitrust investigation, or the provisions of H.R. 39. An attempt has been made to respond to these matters in Appendix B.

I would welcome the opportunity to provide your Subcommittee and staff with any additional information or assistance that may help you in proceeding expeditiously with this bill.

Sincerely,

Thomas E. Kauper

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

APPENDIX A

"CASE STUDIES" DEMONSTRATING NEED FOR ADDITIONAL PRE-COMPLAINT INVESTIGATORY POWERS

. . .

1. We are currently involved in an investigation of one of the largest mergers, in terms of dollar value, to date. An analysis of the competitive impact of the merger in several key markets will determine whether a suit under the Clayton Act will be filed. It is most important that this analysis take into account the most comprehensive and reliable data available. In one of these markets, information necessary for a definitive analysis is not available from public sources. However, there is an industry trade association which reportedly compiles detailed sales and market information annually from its members. We have requested the association to provide this information voluntarily but it has refused. Without this data the result may be a lawsuit based on potentially unreliable figures from some private sources in the industry or a decision not to proceed because of insufficient data.

2. In 1975, two large industrial corporations informed the Antitrust Division that a joint venture between the two would be established by an agreement to be signed approximately six weeks later. The joint venture would manufacture products involving billions of dollars in sales in an already highly concentrated market. Antitrust counsel for the parties offered to provide us with selected documents containing relevant industry data. Some documents revealed positions taken by company personnel which appeared inconsistent with positions taken by the companies during negotiations. In addition, throughout the investigation, there was a concern that a comprehensive review of the parties' files would have produced important information not available in the selective documents provided by counsel. It would have been extremely helpful to have

been able to obtain a broader file disclosure and to depose company personnel on crucial market issues. In short, we had to analyze this important and complex transaction almost entirely on the basis of documents selected by counsel with an assumed bias in the outcome of our evaluation.

3. Some time ago, the Division learned of a contract between two firms which seemed to involve an agreement by the companies not to compete. An investigation was opened and a CID was issued to both parties seeking documents concerning the possible anti-competitive agreement. One document suggested that officials of both companies had met privately, and it appeared that competitive concessions had possibly been made. No such meeting was recorded in any documents produced pursuant to the CID. The possibility of interviewing these officials has been considered but we have found in similar situations that the disadvantages of not having the parties under oath and the absence of a formal record of the interview limits the usefulness of this approach. A comprehensive analysis of this matter requires the ability to depose these two individuals under oath to determine the circumstances under which the contract was negotiated.

4. We are currently investigating the acquisition by a foreign company of a domestic firm which manufactures certain chemical products. It appears that the acquisition may eliminate competition in several markets involving particular chemical products. One of these markets is very highly concentrated, i.e., the top four firms may control as much as 90 percent of the market. However, analysis of the competitive impact of the transaction in that market has been very difficult because of the technical nature of the products involved. The companies argue that these products are easily produced by any company with a broad chemical product line. We have sought market data from the two companies to clarify the situation, but both companies have denied that the information exists in documentary form and have refused to have their officials interviewed. With the power to depose company officials or to propound interrogatories on these issues, we could properly evaluate the competitive issues.

5. In mid-1975, the Division investigated an important acquisition involving large manufacturers of consumer products. The transaction was eventually terminated when the Division expressed its opposition. However, that decision was made without the benefit of industry data which three major competing manufacturers refused to provide voluntarily. This data was readily accessible and would not have unduly burdened the companies. Because of the lack of cooperation this investigation took far more time and effort than it would have if we could have obtained appropriate data, and our conclusions were reached without the benefit of all relevant information.

6. We are currently investigating the merger of two very large domestic corporations. One key issue is whether technology utilized to produce certain products is transferable from one product area to another. A large United States company manufactures products in both relevant areas but has refused to furnish us with information necessary to assess the technology transfer issue. The ability to depose technical personnel may be crucial here since documents alone may be insufficient to answer the complex technological questions raised.

7. Several years ago, we issued a CID to a professional association to determine whether association members had compiled and utilized a fee schedule. Shortly before the CID was served but after the association learned of our investigation, it formally rescinded its fee schedule. Counsel for the association argued that the matter was moot and that the investigation therefore should be terminated. Because of the circumstances under which the schedule had been withdrawn, it was necessary to determine whether the members had in fact ceased using it. One member was interviewed by the staff, but the results were inconclusive since the interviewee was under no obligation to answer the questions fully and accurately. Authority to depose members would have allowed us to determine the motivation and effectiveness of the alleged repeal of the fee schedule.

8. We are currently investigating a significant merger of two direct competitors in the plastics industry. Sales of the specific product involved amounted to $200 million a year. The top four firms that manufacture this

product have approximately 80 percent of the market. Market analysis problems abound in this area due to complex product technology. Two firms that make the specific product involved have refused to allow their personnel to be interviewed. This lack of cooperation has largely frustrated this investigation.

9. We have received complaints that a large service corporation has engaged in what may be a tying arrangement, i.e., it sells its service only to customers that agree to purchase related products. A CID was issued to the company, and, after a court struggle, documents were submitted. However, the investigation is now stalled because the documents are inconclusive. If the oral testimony of persons who have negotiated the relevant contracts could be taken under oath, we could accurately determine whether there has been an anti-competitive effect or purpose. The parties have refused to cooperate voluntarily.

10. In 1970 we issued a CID to a trade association which, because of a protracted court fight, was not enforced until 1973. Documents we did receive were dated and some were ambiguous. Moreover, there are some difficult factual questions concerning the possibly anti-competitive practices flowing from the relationship of the national trade association to local affiliates. Documents have been simply inconclusive on these questions. In lieu of another documentary request with its consequent burden on the association and on the government, it would be more efficient and convenient for all concerned if we could have updated our investigation through depositions and interrogatories. The investigation remains open and will require a substantial input of resources to complete.

11. We are currently investigating a very important service industry to determine whether certain common practices in the industry are in effect disguised price fixing in violation of the Sherman Act. Because of the market power of the target of this investigation, its customers have been extremely reluctant to talk freely and fully with the staff. If we had the power to obtain the oral testimony under oath of officials of these purchasing

companies, we would now be in a much better position to evaluate this complex matter.

12. In 1972 we investigated a proposed acquisition involving agricultural products. The acquiring company declined to comply with a letter request. We then served a CID on it, and the company initially took the position that it would not comply in view of the ruling in United States v. Union Oil Company of California, 343 F2d 29 (9th Cir. 1965). That case holds that parties to an unconsummated merger cannot be forced to comply with a CID because the statute does not apply to "future" violations. The reluctant company did eventually "voluntarily" produce some of the material we had demanded, but we were unable to put together the facts in time to make an intelligent decision on whether or not to sue before the merger was consummated. Thus, our ultimate decision not to challenge this acquisition was delayed until after consummation because of our inability to obtain necessary information quickly.

13. An investigation was commenced into possible restrictive business practices employed by some companies pursuant to which they would not deal with a particular class of subcontractors. Although there was written evidence of such a policy, documents produced by each company provided an insufficient basis upon which to determine whether the firms had in fact complied with this policy. (The fact of compliance was crucial to a determination of actual anti-competitive effect.) Many of the documents relevant to the firms' policy were ambiguous, and there were some indications that this was intentional because of pressures brought to bear upon the companies from conflicting sources. It would have been extremely helpful to have deposed officials of these companies in order to determine precisely the policies and transactions of the firms involved. We were able to interview company officials only after repeated requests. Initial refusals by the company delayed the investigation significantly.

14. Several years ago we conducted an investigation into possible anti-competitive practices and procedures on the part of major integrated oil companies with regard to the acquisition of rights to crude oil owned by the government. The question of access to pipeline facilities by independents was also part of this investigation. It was not a criminal investigation because it was not clear whether the bidding patterns were the result of legitimate joint ventures or to what extent the situation was the result of Interior Department bidding procedures. We undertook the investigation without the use of existing CID authority, and most of the oil companies cooperated fully. However, the investigation took much longer than was necessary because one oil company refused to cooperate. It took approximately a year for this company to produce a limited number of documents, during which time we unsuccessfully sought to arrange interviews. If we had had the power to depose appropriate officials of the uncooperative oil company, we could have avoided much of the time and effort spent in a futile attempt to secure important information.

APPENDIX B

During the Hearings on H.R. 39, held last May and July, opponents of H.R. 39 raised five major objections: that the investigative authority H.R. 39 would provide is largely unprecedented, and improper if vested in an agency whose primary responsibility is law enforcement; that H.R. 39 contains inadequate safeguards against possible prosecutorial abuse; that authority to obtain precomplaint oral testimony infringes the rights of innocent third parties; that target companies are entitled to full participation in precomplaint investigations; and that CID authority should not be available to assist the Department's participation in regulatory proceedings. This memorandum examines each of these arguments and demonstrates that none can withstand critical analysis.

I. Many Federal executive and regulatory agencies, and State Attorneys General, already possess investigative powers comparable to those embodied in H.R. 39, for use in business-related law enforcement activities

A. One objection to H.R. 39 that was raised repeatedly in the hearings was the alleged uniqueness of the CID authority that would result from enactment of the bill. This particular objection was unexpected. Our letter to you, dated March 5, 1975, listed a large number of states possessing substantially equivalent tools of investigation for possible violations of the various state antitrust laws. (See Hearings, p. 184, n. 1). We also noted the many provisions of federal law that grant a wide variety of government agencies comparable or greater powers of investigation, designed to assist the law enforcement responsibilities of those agencies. (See Hearings, p. 186, n. 2).

We have emphasized that the additional civil investigative tools we seek through enactment of H.R. 39 are neither novel nor exceptionally broad; rather they are virtually identical to those long vested in the Federal Trade Commission. Opponents of the bill have contended, however, that such investigative authority may be proper for an administrative agency such as the FTC, but not for the Attorney General, whose responsibilities are primarily those of law enforcement.

This argument fails to recognize that the FTC has important civil law enforcement responsibilities and uses its full investigative powers in discharging them. Commission adjudicative proceedings lead to cease and desist orders. Violations of such orders are enforceable either by contempt proceedings, if the order has been enforced on appeal by a federal court, or by civil actions in which federal courts may impose penalties up to $10,000 for each violation. The Commission is also directed to refer evidence of possible criminal conduct obtained in its investigations to the Attorney General for possible prosecution.

The argument that investigative tools appropriate for the FTC and other administrative agencies are improper when given to the Attorney General has already been answered by the Court of Appeals for the Ninth Circuit. Rejecting a broad constitutional challenge to the existing CID statute, the court noted:

> In this case, Hyster makes much of the fact that the Attorney General, whose duties include prosecution, is the party on whom the power to demand is conferred. The theory is that while it may be proper to confer such authority upon the Federal Trade Commission . . . or the Administrator of the Wage and Hour Division of the Department of Labor . . . or on other "quasi-judicial" or "administrative" bodies or officers, it is not proper to confer it upon the Attorney General.
>
> We are not convinced. The FTC and the Administrator have investigative and enforcement powers and duties, primarily civil in nature. So do many other commissions and administrators. . . . So does the Attorney General under the antitrust laws. . . . He also has the duty to institute prosecutions.
>
> We have no doubt that it is within the power of administrators or administrative boards or commissions, if in the course of authorized investigations they uncover evidence of the commission of crimes, to refer that evidence to the Attorney General. In some cases, Congress has expressly conferred such authority . . . . In our case the Act,

> section 4(d) . . . authorizes delivery of documents to an attorney authorized to appear before a grand jury in a proceeding involving antitrust violations.
>
> The fact that the Attorney General can himself institute a prosecution, instead of referring the information to someone else, may be a distinction, but we do not think that it makes a constitutional difference. He is still a public officer, exercising functions conferred upon him by law. There is no presumption that he will abuse his powers, quite the contrary, and there certainly is no showing that he is doing so in this case. Hyster Co. v. United States, 338 F.2d 183, 186 (9 Cir. 1964).

B. As noted in our March 5, 1975 letter, there are over three dozen provisions in the United States Code authorizing government agencies (other than the Department of Justice) to obtain compulsory testimony. There are penalties for failure to comply. For example, two agencies that are charged with investigation of business activities are the Securities and Exchange Commission and the Internal Revenue Service. The SEC may depose witnesses and secure documents, investigate incipient violations, and, unlike H.R. 39, may seek substantial fines and criminal penalties for failure to comply.*/ The Internal Revenue Service may subpoena any person, and examine books and documents.**/ These agencies are expressly authorized to initiate civil enforcement proceedings, either in their own names or through the Department of Justice, and to refer evidence of criminal violations of their statutes to the Attorney General (see, e.g., 15 U.S.C. 77u). And agency attorneys who have conducted these investigations provide active assistance to the Department or the United States Attorneys in prosecutions resulting from such referrals.

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*/ See 15 U.S.C. §§ 77s, 77x, 77yyy, 78ff, 78u, 79r, 79z-3, 80a-41, 80a-48, 80b-9, and 80b-17.

**/ 26 U.S.C. 7602. The investigative nature of this authority is stressed by the long standing provision that provides for up to 3 years in jail for persons who "obstruct or impede" by corruption or threats of force the work of the Treasury investigator.

This investigative authority has long existed, and has been retained and expanded through subsequent Congressional amendments. Congress has recently recognized again the need for investigative authority in government agencies. Creating the Energy Research and Development Agency and the Nuclear Regulatory Commission in 1974, Congress retained the investigative authority possessed by the AEC (42 U.S.C. 2201(c)), and gave additional specific investigative authority to the NRC (42 U.S.C. §5846).

C. After further review of the state statutes, we have identified another state, Washington, that has precomplaint investigative authority for antitrust enforcement (Rev. Code of Washington, Title 19, Sec. 19.86.110). We also discovered that the Missouri statute has been amended (Rev. Stats. Mo. Chap. 416, sec. 416.091).

Many of these state laws are of recent origin. Three states have recently enacted state antitrust laws: Washington, chapter 19.86 -- "Unfair Business Practices -- Consumer Protection," enacted 1961, amended 1970; the "New Jersey Antitrust Act," effective 1970; and the Virginia "Fair Trade Act" in 1974. The New Jersey and Virginia statutes have provisions comparable to those in H.R. 39. Under those laws any person may be subpoenaed, persons may be deposed and documents obtained. And, in at least one respect, both the New Jersey and Virginia laws are broader than H.R. 39. Any incipient violation of the state antitrust law may be investigated -- not just "mergers . . . or similar transactions" as would be authorized by H.R. 39.

In addition, many other states have authority to investigate incipient violations -- Hawaii, Illinois, Missouri, New Jersey, New York, Virginia and Washington. Also many other states have investigative authority to obtain the production of documents and testimony from witnesses: Arizona, Connecticut, Kansas, Louisiana, Maine, New Hampshire, North Carolina, Puerto Rico, and South Carolina. Some of these provisions relating to testimony are very old -- Arizona, Kansas, Louisiana, Maine, and North Carolina -- others more recent. There has been much litigation concerning these state statutes. Decisions can be found both upholding the authority of the state officials to employ these useful tools, and also protecting the rights of the persons subject to subpoena. One recent case is particularly pertinent to claims that H.R. 39 would provide unique powers.

In State ex rel. Londerholm v. American Oil Co., 202 K. 185, 446 P.2d 754, 757 (1968), the Supreme Court of Kansas observed that the

> . . . procedure here involved is an historically well-known legislative device enabling the state's chief law enforcement officer to gather information necessary for effective enforcement of our antitrust laws. The proceeding is not adversary but is ex parte; it is investigative and not adjudicatory. Of course, facts uncovered through it may lead to an adjudicatory hearing, civil or criminal, the same as information disclosed by any other method of investigation. That which the corporate appellants are really asserting is the right to be present during the attorney general's investigation. The right to an adjudicatory hearing includes the right to counsel. But we know of no constitutional right in anyone to be present at an investigation simply because his conduct is the subject of the inquiry and he may be in the future prosecuted as a result of information developed during the investigation. A witness appearing in an inquisition could well be a former employee of a corporation or he could be a person without any business connection with the corporation; in either event we know of no right in the corporation to be notified of the proceeding, to appear thereat or to be represented by counsel. It is true vitally relevant information concerning violations of our antitrust laws may sometimes be secured only through the testimony of employees or agents of those corporations suspected of irregularities.

The court then held that "where an employee is questioned about possible antitrust law violations by his corporate employee the corporation has no constitutional right to be represented by counsel."

II. Safeguards in present law and H.R. 39 effectively guarantee that investigative powers will not be abused.

A. Present law (15 U.S.C. 1314(b)) authorizes any CID recipient to petition a district court to modify or

set aside the demand, basing his claim on "any constitutional or other legal right of such person." 15 U.S.C. 1312(c) forbids any CID requirement which would be unreasonable if contained in a grand jury subpoena. H.R. 39 would preserve these protections; it would also specifically authorize a CID recipient to refuse to comply with its demands "on grounds of privilege, or self-incrimination or other lawful grounds." Additionally, the Department has proposed to amend 15 U.S.C. 1312(c) to provide a right of objection to written interrogatories which impose "an undue or oppressive burden."

Existing case law establishes broad standards for reviewing CIDs and grand jury subpoenas. All recognized objections to these subpoenas would be available under H.R. 39 to third parties as well as to investigatory targets, and could be raised in oppossition to a CID seeking oral testimony.

Opponents of H.R. 39 frequently express concern that precomplaint investigatory powers are subject to abuse. But case law shows that courts will not permit use of CIDs to conduct "fishing expeditions." An appropriate ground for objection to a CID is that the Department lacks jurisdiction over the activities under investigation by reason of an antitrust examption (see Texas Board of Public Accountancy v. United States, ___ F.2d ___ (5th Cir. 1975), cert. den. 12/15/75; Amateur Softball Assn. v. United States, 467 F.2d 312 (10th Cir. 1972); Chattanooga Pharmaceutical Assn. v. United States, 358 F.2d 864 (6th Cir. 1966); and the courts have closely scrutinized allegations that an antitrust investigation has been improperly motivated (see American Pharmaceutical Assn. v. United States, 344 F. Supp. 9 (E.D. Mich. 1971); United States v. United States Gypsum Co., 1974 Trade Cases, ¶75,352 (W.D. Pa.); Petition of Cleveland Trust Co., 1972 Trade Cases, ¶75,352 (W.D. Pa.).

The limitations and protections embodied in the ACPA are obviously substantial ones, and the Division has always taken them very seriously. Perhaps the best evidence that there has not been abuse is the fact that, of nearly 1700 CIDs issued in the past 13 years, there are scarcely more than a dozen reported cases in which a recipient has found it necessary to invoke the assistance of a federal court to protect its perceived rights and privileges. Since all

existing safeguards are carried forward by H.R. 39, there is no reason to expect any different result if the bill is enacted.

B. Opponents of H.R. 39 have raised the spectre of innocent parties being forced to expose themselves to contempt citations in order to obtain appellate review of court orders enforcing CIDs. Such claims are based on a misunderstanding of the ACPA. 15 U.S.C. 1314(d) expressly provides that a final order enforcing, modifying or setting aside a CID shall be appealable pursuant to 28 U.S.C. 1291. This section is unchanged by H.R. 39. A petition to enforce, or to modify or set aside a CID is an original proceeding in district court. No other dispute is before the court in such a proceeding. The court's order resolving the dispute thus presented is necessarily final and appealable. To our knowledge no person subject to an order enforcing a CID has found it necessary to place himself in contempt as a predicate to seeking appellate review.

C. 15 U.S.C. 1312(a) requires that all CIDs be issued by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division. The authority is not further delegable. In practice this means that all CIDs are reviewed and approved personally by the Assistant Attorney General. This is not the Division's practice with respect to grand jury subpoenas, which are usually approved only by the section or field office chief who supervises the investigating attorney. Thus the statutory requirement insures that CIDs receive closer scrutiny and more extensive review than grand jury subpoenas. Indeed, even if this were not required by statute it would probably be the practice in any event; the policy issues raised by civil investigations are likely to be more subtle and complex than those presented by the type of hard-core offense which the Division prosecutes criminally.

We believe that this factor is highly relevant in assessing broad claims that CID powers are likely to be abused, and that H.R. 39 would confer an inquisitorial power on the Division more sweeping than that possessed by a grand jury.

D. A well-established basis for objecting to a CID is a claim that it seeks material irrelevant to the proper scope of the investigation. See Materials Handling Institute v. McLaren, 426 F.2d 90 (3d Cir. 1970). Opponents

of H.R. 39 have alleged, however, that this affords a hollow right to persons subject to oral deposition, since they would be afforded no basis to know the scope of the intended questioning or its relevance to the investigation.

In fact, a person from whom oral testimony is sought will rarely, if ever, be in doubt about the nature of the inquiry. We contemplate that a notice for the taking of a CID deposition will almost invariably be preceded, or accompanied by, a CID for documents. This procedure is sound investigative practice. It enables the investigator to prepare himself for the deposition and to focus his questions. A CID seeking documents serves a purpose analogous to a bill of particulars, stating the nature of the conduct under investigation and describing the classes of documents sought with sufficient specificity to permit their identification. Such CID requests will serve the same function in defining the scope of investigation under H.R. 39 as they do under present law.

In rare instances oral testimony unrelated to documentary evidence may be sought. Counsel for the prospective deponent, however, will surely insist upon adequate foreknowledge of the scope of inquiry to permit a determination of relevance before agreeing to produce his client for deposition. The antitrust investigator has strong incentives to satisfy that legitimate need, since failure of a witness to cooperate voluntarily can only delay or impede the investigation.

Finally, of course, no testimony can be compelled under H.R. 39 except by order of a Federal district court. Such an order will not issue unless the Department establishes the propriety of the investigation, the reasonable scope of the inquiry, the relevance of the information sought by deposition, and the absence of any other valid objection.

III. H.R. 39, and amendments proposed by the Department of Justice, protect the rights <u>of recipients of CID demands for oral testimony.</u>

A. Several witnesses opposing H.R. 39 have focused on the allegedly inquisitorial nature of provisions for

the taking of oral testimony. They have analogized a CID deposition proceeding to a grand jury proceeding, and suggested that it would lack the essential protections afforded by the grand jury procedure. These allegations have greatly distorted the nature of the precomplaint deposition, and ignored the careful safeguards provided in H.R. 39 and our suggested amendments.

Under H.R. 39, a person compelled to appear to give oral testimony may be accompanied by counsel, who may interpose himself between the questioner and his client when he believes the questioning threatens his client's interest. This protection is not afforded a grand jury witness. Under H.R. 39, counsel may object on the record when he believes the deponent is entitled to refuse to answer a question "on the grounds of privilege, self-incrimination or other lawful grounds." He may advise his client to refuse answers to any or all questions propounded. In either event, the witness' silence must be respected, unless the government attorney obtains a district court order compelling an answer. The proceeding to obtain such an order would be fully adversary, and the deponent would have the right to counsel.

The deponent may also clarify or complete answers "otherwise equivocal or incomplete on the record" at the conclusion of the examination. The Department has proposed an amendment to H.R. 39, to permit the deponent to examine his transcribed testimony and to request the hearing officer to enter changes on the transcript, provided reasons for such changes are indicated. Counsel would obviously be available to assist the witness in examining and completing the record.

The Department has also proposed an amendment which would exclude from the examination all persons except the deponent, his counsel, the hearing officer and the stenographer. This is in large part a protection for the witness, enabling him to preserve, to the extent he so desires, the confidentiality of his testimony. It obviously affords no opportunity for the investigator to intimidate these witnesses; the presence of counsel protects against this.

The hearing officer is not a Department official, but a neutral party, with authority to administer oaths in the

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jurisdiction. In most instances the stenographer will also serve as hearing officer, as is the practice in depositions under the Federal Rules of Civil Procedure. His function is essentially a housekeeping one, much like the "presiding official" in an FTC investigational hearing. He has no authority to compel answers, or to impose sanctions for noncooperation. The decision to answer particular questions, or terminate the entire proceeding, always lies within the discretion of deponent and his counsel.

B. H.R. 39 affords any deponent the right to obtain a copy of his transcribed testimony, except that for good cause shown he may be limited to inspection of the official transcript. The burden of establishing good cause would be upon the Department. This is a significant right, not afforded to grand jury witnesses; at least one supporter of the legislation has suggested that it may impede investigations by facilitating dissemination among target companies who can thus orchestrate a joint defense. (See Hearings, at p. 151). This is undoubtedly true, but it is also true that any witness who wishes to cooperate with potential defendants is always free to do so.

The Department favors retaining the witness' right to obtain a copy of his testimony. Our purpose in seeking authority to compel oral testimony from third parties is investigative, not to coerce or entrap innocent parties. A witness may always choose not to obtain a copy, if he fears that he may be forced to reveal it to a target of the investigation such as an employer or major customer or supplier.

C. Perhaps implicitly recognizing the adequacy of safeguards for witness' rights, some opponents of H.R. 39 advance the somewhat inconsistent suggestion that enactment may make antitrust enforcement more complex, costly and time-consuming by adding a preliminary stage of adversary proceedings, litigation and appeals involving depositions and interrogatories. The short answer is that such has not been the history of CID investigations. We are confident it will not be in the future.

As noted earlier, fewer than one percent of the nearly 1700 CIDs issued by the Antitrust Division have required adjudication by the courts. One reason is the disincentive to litigate at the investigatory stage unless it is absolutely necessary. One important element of efficient

investigation is timeliness; resort to the courts to enforce our demands, even when successful, inevitably delays the inquiry while the evidence becomes stale, and the activities under investigation may lose their immediate importance.

We have every interest in tailoring our demands to satisfy the legitimate concerns of recipients, so that compliance will be expeditious and voluntary. This interest is even stronger with respect to CIDs directed to third parties under H.R. 39. While target companies may employ resistance to prevent disclosure to the Department of illegal acts, there will be little reason to suspect third parties of being so motivated. In most cases, therefore, it should be possible to reach an accommodation between our needs and the interests of the CID recipient, without resort by either side to litigation.

IV. Adversary participation by target companies in precomplaint investigations would be unprecedented, unworkable, and unnecessary to the protection of legitimate interests.

A. Those who oppose extension of CID authority to include the obtaining of oral or written testimony from third parties urge that any such authority should be conditioned on a right of counsel for the target to notice of such proceedings, an opportunity for adversary participation, and access to materials and transcripts collected. The Department of Justice is convinced that such an amendment to H.R. 39 would destroy the utility of any deposition power for the following reasons:

(1) At the preliminary stages of an investigation it is impossible to know who the targets are since the objective at this point is to determine whether an antitrust violation has occurred and if so, who has committed the violation. Thus, as a practical matter it would be impossible to implement this recommendation.

(2) The participation of representatives of the target would greatly complicate and delay the progress of the investigation. Assuming that the targets could be identified, it is not uncommon for an investigation to involve a large number of potential defendants. The presence of attorneys for each target would certainly bog down the investigation.

(3) The mere presence of representatives of the target would discourage third parties from cooperating with antitrust investigators. The target could retaliate against such parties, who might be employees of the target, competitors or customers. An employee, customer, or supplier whose economic survival is dependent on the target is unlikely to be comfortable in giving adverse information about the target in its presence. Yet they are most likely to possess the needed information about antitrust violations.

(4) The participation of the target would provide it with specific detailed knowledge of where the investigation is headed. The target could thus destroy crucial documents or fabricate a defense on the basis of that knowledge, thereby thwarting the investigation.

The proposed participation of the target at the pre-complaint stage is unprecedented in American jurisprudence whether one looks to civil or criminal analogies. Courts have consistently held that no such right exists at the investigatory stage. See, e.g., Hannah v. Larche, 363 U.S. 420 (1960). It would transform the pre-complaint investigation into a mini-trial; the investigatory function would be converted into an adversary proceeding.

Except for preventing the detection of antitrust violations, the target has no substantial interest in participating at this stage since it will have a full opportunity to present a defense if suit is filed. Pre-complaint statements would generally be inadmissible in subsequent litigation as hearsay. The government would be required to prove its case in court at which time the target would have every opportunity to make its defense.

B. It has been asserted by some that under the new Federal Rules of Evidence, Rule 802(d)(1), CID oral deposition testimony would be admissible at trial as proof of the matters asserted. It is argued that this rule is unfair to the defendant because he had no opportunity to cross-examine the witness during the oral deposition.

Rule 802(d)(1) would authorize the introduction of CID oral deposition testimony as non-hearsay only in two limited circumstances. First, when the deponent testifies at trial, is subject to cross-examination concerning his CID statements, and those statements are inconsistent with

his trial testimony, then the CID statements are admissible to prove the truth of the matters asserted. No unfairness is involved in this case because the defendant may cross-examine the deponent concerning his CID statements.

Second, when the deponent testifies at trial and is subject to cross-examination concerning his CID statements, those statements are admissible as non-hearsay if (1) consistent with his trial testimony, and (2) offered to rebut a charge of recent fabrication or improper influences or motive. Again, there is no unfairness to the defendant because the admissible CID statements are subject to full cross-examination.

C. Insistence on participation by the target at the investigative stage is grounded in part on the allegation that our purpose in seeking additional civil investigative authority is to gather information in cases we have already decided to file. But once we have satisfied ourselves that a violation exists which merits prosecution, the civil discovery rules are fully adequate for that purpose. Where our pre-complaint investigatory tools are inadequate today, as the cases discussed in Appendix A illustrate, is in affording us sufficient information to make a reasoned determination as to whether a violation exists which should be prosecuted.

Since enactment of the ACPA, only fifteen percent of our CID investigations have resulted in the filing of cases. From our perspective, one vital purpose of pre-complaint investigation is establishment to our satisfaction that a violation does <u>not</u> exist. This permits redeployment of limited resources to more productive use. At present we too often face the Hobson's choice of closing promising investigations for want of sufficient evidence of violation, or filing weak cases in the expectation that such evidence will be developed in post-complaint pretrial discovery.

The Division's ability to file civil actions to trigger pretrial discovery is an unacceptable alternative to adequate pre-complaint investigatory tools. To file suit solely to trigger discovery rights would be an abuse of the judicial process. "The compulsory processes of the judicial system should not be made available for other than judicial purposes. . . . [A plaintiff] cannot pretend to bring charges in order to discover whether actual charges

should be brought." Judicial Conference of the United States, Procedure in Anti-trust and Other Protracted Cases, 13 F.R.D. 62, 67 (1951). Moreover, the decision to sue commits Division resources to expensive litigation, and burdens overcrowded court dockets with cases likely to be complex and time-consuming. And the mere announcement of such a suit commands extensive public attention, which may adversely affect named defendants, no matter what the outcome of the litigation.

We believe that providing the Division with necessary tools for effective pre-complaint investigation will substantially benefit both the business community, by reducing the risk of unwarranted prosecutions, as well as the public interest, by increasing prosecutions of major violations. It is clear that interjection of the target into an adversary role at the investigative stage would defeat both objectives.

V. Use of CID authority to support participation in regulatory proceedings would advance the public interest in a competitive economy.

A. H.R. 39 would authorize the Antitrust Division to use its CID investigative powers to gather information relevant to our participation in pending administrative or regulatory agency proceedings. This authority is sought in recognition of the Division's expanding role as an advocate of procompetitive policies in proceedings before the agencies.

The economic importance of this activity is substantial; approximately 20% of the GNP is currently subject to regulation. The Federal Trade Commission has recognized the importance of this activity, and recently commenced its own program of participation on competitive issues before administrative and regulatory bodies. Obviously the Commission's investigative powers, similar to those we seek in H.R. 39, are available to it in this effort.

B. Some have objected to this authority because it would give the Department broader discovery powers than may be available to other parties in a proceeding. But the Department does not participate on the same footing as other parties, who are asserting their private interests in obtaining a benefit or protection from the regulators.

Our interest is as an advocate, often the only one, of the public interest in maximizing competition in the determination of regulatory policy. Where our arguments are unpersuasive for want of adequate supporting data available only in the files of private parties without incentive or duty to produce it, it is the public interest which suffers.

It is also argued that use by the Division of CID powers would nullify the host agency's ability to control discovery proceedings under its own rules. We believe this exaggerates the situation. It should be emphasized that all information so gathered to assist our participation would be subject to examination by other parties and the agency to the same extent as other information sought to be entered in the record of the proceeding. Moreover, we anticipate that we would most often make use of CID information in rulemaking proceedings, of industry-wide consequence, where agency procedures are usually informal, and no discovery is provided for by agency statutes or rules.

It is true that under H.R. 39 the scope and propriety of a CID investigation would be subject to determination by a federal judge, rather than an administrative law judge. We would not agree, however, with the argument that federal judges are less qualified than the ALJ's to evaluate relevance and other issues in the context of the regulated industry involved. On the contrary, we would expect federal judges, especially those sitting in districts where major corporations maintain their principal places of business, and where discovery contests are most often decided, to be fully competent to assess the merits of highly sophisticated commercial issues. And this procedure has its parallel in Federal civil practice today: district courts where discovery is sought may be called upon to rule on objections in cases being litigated under the control of courts in other districts.

Finally, it is suggested that existing inadequacies in agency discovery rules should be addressed directly, through legislation to amend those rules. We agree, and would view with favor such an effort. As a practical matter, however, such piecemeal reform is a long-term project at best. Permitting the Division to supplement agency discovery rules where necessary promises more immediate benefits to the public interest in promoting competition in regulated industries.

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

December 24, 1975

Honorable Peter W. Rodino, Jr.
Chairman, Subcommittee on Monopolies
and Commercial Law
Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

Dear Chairman Rodino:

I am writing to you and your colleagues on the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary both to thank you for continued support over the past year for strong antitrust enforcement, and to reiterate the importance of prompt and favorable action on H.R. 39, which would amend the Antitrust Civil Process Act of 1962.

In the past year, many steps have been taken to advance the cause of vigorous enforcement of the antitrust laws. Enactment of the Antitrust Procedures and Penalties Act of 1974, by increasing the penalties for violations of the Sherman Act, strengthened the prohibitions contained in that cornerstone of antitrust policy. Repeal of federal fair trade enabling legislation, long favored by antitrust enforcement agencies, should advance the public welfare almost immediately. Significant budget increases for antitrust enforcement agencies have already been employed in newly diversified and intensified antitrust enforcement programs.

These developments were fully supported by the Committee on the Judiciary, and particularly the Subcommittee on Monopolies and Commercial Law, which have traditionally been strong supporters of vigorous and equitable antitrust enforcement. It is therefore appropriate that an appeal be directed to the Subcommittee once again for enactment of legislation vital to our antitrust enforcement efforts.

Pending before the Subcommittee is an Administration sponsored measure, H.R. 39, which would amend the Antitrust

Civil Process Act of 1962. Enactment of this legislation is vital to close a gap presently existing in our enforcement authority and to assure that the increased funds appropriated to the antitrust enforcement effort will be utilized in the most efficient and effective manner.

While the Department of Justice has ample authority to investigate criminal violations of the antitrust laws, our ability to investigate civil violations is severely constrained by restrictions contained in the 1962 Act. H.R. 39 would accord the Department of Justice essentially the same investigatory powers long possessed by the Federal Trade Commission. Without the necessary investigative tools, there is little hope that increased appropriations, standing alone, can accomplish all that supporters of antitrust enforcement believe is necessary in today's growing and complex economy.

H.R. 39, with its origins in the 93d Congress, is a carefully drafted proposal that is responsive to both the investigatory needs of the Antitrust Division and the legitimate concerns of those under investigation. Enactment of the bill would mark another step in the careful and logical evolution of an effective antitrust enforcement policy.

Until 1962, the Division's authority to conduct meaningful civil investigations was severely limited. If the Department had reason to believe that the antitrust laws were being violated and that a criminal prosecution would be warranted, it could seek to develop that case through grand jury subpoena. If, however, the Division believed that a civil suit would be more appropriate, its investigatory powers were inadequate. It could seek the cooperation of the parties, ask the Federal Trade Commission to conduct an investigation pursuant to its statutory powers, or attempt to utilize the grand jury. The first two options were clearly deficient because the parties usually had no incentive to cooperate and the FTC often had no background concerning the matter being investigated. The third option was of uncertain propriety because the Supreme Court indicated reservations about the legality of using the grand jury when only a civil case was contemplated and because the use of a grand jury could subject persons to pressures and stigma unwarranted by the circumstances of the particular case.

Upon the recommendation of two Presidents and the Attorney General's National Committee To Study the Antitrust Laws, the Antitrust Civil Process Act of 1962 was enacted to broaden the Department's authority in civil investigations. This Act authorized the issuance of a civil investigative demand (CID) by the Assistant Attorney General to a person suspected of violating the antitrust laws, requiring that person to turn over to the Department "any documentary material relevant to a civil antitrust investigation." Provisions in the Act permitted a person to challenge judicially a CID and to secure the return of the material upon the completion of an investigation.

While the 1962 Act was a marked improvement over prior practice, our experience during the last thirteen years has convinced us that the Act does not go far enough to permit development of relevant and necessary information prior to the filing of a civil complaint. The 1962 Act was deficient in two very important respects. First, CIDs could only be issued to persons suspected of violating the antitrust laws. The Antitrust Civil Process Act did not reach third parties, such as customers, suppliers or competitors, who often have relevant and very important information about an antitrust violation. Second, the Department could request only documentary material pursuant to its CID authority. No provision was made for the submission of interrogatories or the taking of depositions despite the fact that these methods are very often less burdensome to the businessman and more helpful to the antitrust investigator.

The enactment of H.R. 39 would correct these deficiencies by authorizing the issuance of CIDs to any person who "may have knowledge of any fact or facts, relevant to a civil antitrust investigation," (or, as recommended by the Department, "may have any information . . ."). The CID may be in the form of a demand for (1) production of documents, (2) answers to written interrogatories, or (3) the giving of oral testimony.

Notwithstanding the fact that the bill authorizes no procedures that are not commonly employed by numerous federal agencies, careful safeguards have been incorporated in H.R. 39 to protect against even the appearance of governmental overreaching. Grounds for challenging requests,

interrogatories, or questions are carefully enumerated. Procedural safeguards, including the right of a person to the assistance of counsel during the taking of depositions, are provided. Furthermore, the powers of Department attorneys are carefully circumscribed: in the event a dispute arises regarding the propriety of any demand or request, the government must petition a court in order to secure enforcement of the demand or request. These protections assure that the legitimate interests of persons under investigation or third parties with important information will not be compromised.

In addition to these primary objectives of H.R. 39, enactment of the bill would accomplish two additional objectives. First, the Antitrust Civil Process Act would be clarified to make it clear that a CID may be issued to investigate a contemplated but not yet consummated merger or acquisition. One circuit court of appeals has held that the 1962 Act does not cover such activity, and persons testifying before the Subcommittee in May and July were virtually unanimous in supporting this clarification. Second, H.R. 39 would authorize the use of materials obtained pursuant to CID authority in the Department's activities before federal administrative agencies. This authority is important to assure that principles of competition are adequately presented to and considered by federal regulatory agencies whose activities have a significant impact upon our nation's economy.

I have stated several times in the past that enactment of amendments to the Antitrust Civil Process Act is the Antitrust Division's paramount legislative priority. That remains true today. Enactment of H.R. 39 would permit the Antitrust Division to make a more informed judgment on whether or not to institute a civil antitrust suit or appear in a federal regulatory agency proceeding. This additional investigatory ability would decrease the likelihood that antitrust violations will go undetected and will also help assure that the Antitrust Division does not bring civil actions based on incomplete factual information. Such a development would not only benefit the Antitrust Division by conserving its resources but would also benefit potential defendants who would be spared the expense and uncertainty of protracted litigation.

The President has endorsed the speedy passage of this legislation twice, once in his Economic Message and again in the State of the Union Address. He and the Congress are apparently agreed in principle that the most efficient utilization of our nation's resources and the maximization of consumer welfare will occur through increased reliance upon a free market economy. Vigorous antitrust enforcement is fundamental to this goal, and enactment of H.R. 39 is necessary to truly effective enforcement efforts by the Antitrust Division.

I therefore strongly urge that you support prompt and favorable consideration of H.R. 39 by the Subcommittee on Monopolies and Commercial Law, the Committee on the Judiciary, and the House of Representatives.

My staff and I stand ready to assist you in whatever ways you may find helpful.

Sincerely yours,

Thomas E. Kauper

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

November 19, 1975

Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

During hearings held by the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary on H.R. 39, a bill to amend the Antitrust Civil Process Act, several witnesses expressed concern that certain provisions of the bill posed dangers to the civil liberties of businesses and businessmen.

In response to your request that the Department of Justice work to resolve questions raised about H.R. 39, we have carefully reviewed the hearings and have concluded that the dangers feared by witnesses before the Subcommittee are generally not well-founded.

Many of the objections raised center on those provisions of H.R. 39 that would authorize the taking of depositions. Since the Department is authorized under the Antitrust Civil Process Act to secure documentary material, the objections to the deposition authority must be based upon considerations unique to that form of legal communication rather than upon a general objection to providing any information at all.

The taking of depositions may, in a particular case, provide a more direct and less burdensome method of legal communication than requests for documents. Since the objective of the Department of Justice is to file civil complaints only where it has concluded that an antitrust violation has occurred, it is in the best interests of both the government and private parties that the Department have the tools to make that assessment on the basis of sufficient information.

Concerns expressed about granting the Department the authority to take depositions at the precomplaint stage are

apparently based upon a fear that persons being deposed will somehow be subjected to unreasonable pressures by Department attorneys. Recognizing and anticipating these concerns, the Department has consistently supported incorporation of procedural safeguards that assure protection against overreaching while at the same time preserve the effectiveness of the precomplaint investigatory process.

Many of these safeguards have already been incorporated in H.R. 39. Certainly the greatest protection is the right of the person being deposed to be accompanied by counsel who may advise his client to "refuse to answer on grounds of privilege, or self-incrimination or other lawful grounds." The person examined may clarify or complete answers "otherwise equivocal or incomplete on the record." Additionally, the Department of Justice has supported the provisions in H.R. 39, and urged the addition of a similar provision in Title II of S. 1284, that entitles a person to secure a copy of his testimony except in rare instances. If disagreements arise regarding the propriety of any particular inquiry, the burden is upon the antitrust investigator to petition a United States District Court for an order requiring the person to answer the question.

The taking of depositions is a common occurrence in our judicial system, and, when combined with the protections presently found in H.R. 39, it is difficult to understand these objections.

Some persons have criticized H.R. 39 because it does not authorize the presence of the target of an investigation during the taking of oral testimony of a third party.. The Department of Justice strongly believes that any amendment to H.R. 39 that would provide for the presence of the target or his representatives in those circumstances would effectively destroy the utility of the deposition authority for two reasons.

First, as a practical matter, it is generally impossible to identify the targets of a particular investigation until substantial material and information have been obtained. Most of our antitrust investigations are initiated in response to complaints referred to the Department by customers, suppliers, or employees. Requiring the representatives of the target to be present at a stage of the investigation that is directed largely at determining <u>who</u> the targets of the investigation should be is a contradiction in terms.

Second, and more fundamentally, the presence of counsel for the target at precomplaint deposition hearings would turn the investigatory process into an adversary hearing without precedent in American jurisprudence. If there is an appropriate analogy, it would be to the grand jury investigation where it is clearly and firmly established that counsel for the person under suspicion has no right to be present during examination of his client, let alone third parties. One of the most compelling justifications for this secrecy is the concern that, absent assurances of confidentiality, witnesses may be reluctant to testify fully and completely; this concern applies equally well to the civil antitrust investigation because suppliers and customers may otherwise be subject to retaliation by the target for their cooperation with authorities. The ability of putative defendants to intimidate prospective witnesses or to formulate a common defense strategy tailored to evidence obtained by the government also weighs heavily against turning the investigation into an adversary proceeding. Secrecy in this setting is acceptable because of the right of a defendant, in subsequent civil or criminal proceedings, to cross-examine fully all witnesses and to object to the introduction of evidence on appropriate grounds of law or privilege. It must be remembered that the inquiry by the Department at this stage is simply to determine whether suit should be brought. In the event a complaint is filed, then, and only then, will the matter proceed through the litigation process, during which time the target will have the opportunity of every defendant to be present and participate at all appropriate stages.

Other objections that have been raised regarding H.R. 39 apply more generally to all attempts to secure information, whether by requests for documentary material, interrogatories, or depositions. One concern, with which the Department of Justice agrees, is that certain language in H.R. 39 is unnecessarily broad and could be used to engage in "fishing expeditions."

As presently written, H.R. 39 would authorize the issuance of a Civil Investigative Demand to investigate, inter alia, "any activity which may lead to any antitrust violation." The breadth of this authority could render meaningless a person's right to object to a CID on grounds of relevance. The Department of Justice has taken a position in both the

Senate and the House of Representatives in support of narrower authorization. Section 201 of S. 1284 would restrict the use of CIDs, inter alia, to investigation of "activities preparatory to a merger, acquisition, joint venture, or similar transaction, which may lead to any antitrust violation." This language is designed to clarify the Department's authority to investigate incipient antitrust violations, which is especially important with regard to possible violations of Section 7 of the Clayton Act. S. 1284 would also require each CID to state the nature of the investigation and the relevant statutory provisions; this requirement would provide sufficient notice to the recipient of a CID, and the Department of Justice supports this provision.

Some questions have been raised regarding the possible use of CIDs to obtain information for use in Federal administrative or agency proceedings and the wisdom of according the Department any broader discovery powers in agency proceedings than are available to other parties. The Department of Justice firmly supports broadening its authority to obtain information for use in these agency proceedings. H.R. 39, as presently written, supports this position although we have proposed minor amendments that would eliminate any ambiguity on this point. (See Hearings on H.R. 39 Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, 94th Cong., 1st Sess. 55, 56, 65 (1975)).

The Department expends a substantial portion of its resources to intervene in administrative or regulatory proceedings having potentially significant anticompetitive effects. See Hearings, supra, at 189-214. Injecting antitrust considerations into regulatory proceedings is economically important because approximately 20 percent of the GNP is currently subject to federal regulation. Federal agencies generally lack the antitrust orientation needed to achieve their regulatory goals in the least anticompetitive manner. The economic importance of the Department's use of CIDs in connection with intervention in federal regulatory proceedings is thus clear.

Antitrust laws reflect the strong national commitment to making free and unfettered competition the general rule of trade. They reflect the conclusion that competition best serves the public interest. Because its intervention in regulatory proceedings is designed to advance this broad public interest, as opposed to any private or special interest,

we believe that utilization of the investigatory authority of the Department in appropriate regulatory proceedings is desirable and clearly in the public interest. It should be emphasized that information obtained through our investigatory authority and subsequently used to assist the Department's participation in regulatory proceedings would be subject to examination by other parties to the same extent as other information sought to be entered in the record of the proceeding.

H.R. 39 would authorize the issuance of CIDs to persons who may have knowledge of any facts relevant to a civil antitrust investigation, without regard to whether that party is a target of the investigation. Concern has been expressed that third parties may be forced to incur substantial legal expenses and be stigmatized by receiving CIDs. The Department of Justice does not regard these fears as well-founded. Suppliers, customers, and competitors are frequently in a unique position to know information relevant to an antitrust investigation but may be inhibited from cooperating because of fears of retaliation. CID authority is necessary to obtain this information, and the Department has supported amendments to H.R. 39 that would clarify the right of a person to object to a CID on grounds that it imposed "an undue or oppressive burden" or would be held to be unreasonable if contained in a subpoena duces tecum. See Hearings, supra, at 68. Speculative fears of stigmatization cannot supersede the responsibility of citizens to cooperate with law enforcement authorities.

There is the intimation in some of the testimony that opposition to H.R. 39 stems not so much from serious concerns about the merits of the bill but rather from a generalized interest in confining or restricting meaningful antitrust enforcement by opposing enactment of modifications of our investigative authority. To be sure, broad discretionary powers should not be conferred unnecessarily upon law enforcement authorities, but history shows that antitrust enforcement agencies have not abused their investigative powers. The FTC currently has investigatory powers similar to those proposed in H.R. 39, and several state attorneys general possess investigative powers comparable to or greater than the proposed authority of the Department. No evidence has been presented to indicate that either federal or state authorities have abused existing investigative authority.

Persons who would oppose fair but vigorous enforcement of the antitrust laws face strong obstacles at this stage of our Nation's development. Today there is unprecedented commitment to the antitrust laws both in the Executive Branch and within the Congress. The President has strongly supported vigorous antitrust enforcement because it is in the best interest of our economy and the Nation's consumers. As he noted in Chicago recently, "Competition, when freed of Government regulation and supported by anti-trust laws, is the driving force of our economy." Thus the Administration has endorsed expanded CID powers, as well as other antitrust legislation before your Committee. We stated our views on H.R. 8532 in my letter of September 25, 1975. These legislative proposals would greatly strengthen antitrust enforcement capabilities, and we would urge your support for their early consideration by the House of Representatives.

Sincerely yours,

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

February 18, 1976

The Honorable Philip A. Hart
Chairman
Subcommittee on Antitrust and Monopoly
Senate Judiciary Committee
Washington, D.C. 20510

Dear Senator Hart:

This letter is in response to a request earlier today from a member of the Subcommittee staff that the Department of Justice examine and comment upon proposed amendments (numbered 1, 3, 4, 5 and 7) to Title II of S. 1284.

Amendment 1 would amend §2 of the Antitrust Civil Process Act by eliminating the Federal Trade Commission Act and any statute which prohibits any unfair trade practice in or affecting such commerce from the definition of "antitrust law." On this short notice, we have been unable to trace the origin and justification for inclusion of these statutes in the definition of "antitrust law." Inasmuch as no mention of this issue was made in the hearings, we fail to understand why the Act should be amended in this respect. For that reason, the Department of Justice opposes this amendment.

Amendment 3 would delete language from the bill that would confirm the Department's authority to issue a CID to an entity acting or purporting to act under color of state law. In testimony before the Subcommittee, the Department opposed inclusion of this language as unnecessary. Upon reflection, however, and in light of the problems suggested by United States v. Texas Board of Public Accountancy ___ F.2d ___ (5th Cir. 1975), in which a state agency sought to quash a CID, the Department has decided not to oppose inclusion of this language, and hence opposes Amendment 3.

Amendment 4 would delete from Title II the authority to issue a CID in connection with a Federal administrative or regulatory agency proceeding. The Department of Justice supported this authority in testimony before the Subcommittee, although we indicated that we probably would not use this

authority in many agency proceedings. Therefore the Department opposes this amendment.

Amendment 5 would delete from Title II the authority to submit interrogatories or depose persons pursuant to CID. The Department of Justice regards these provisions as very important to Title II and thus opposes this amendment.

Amendment 7 would require the Department to turn over to any person who has submitted documentary materials or copies all copies made by the Department. Under present law, the Department may come into possession of copies of documents in one of two ways. First, under §4(b), a person subject to a CID may supply copies of documents to the Department in lieu of originals. Second, under §4(c), the Department may make copies of documentary material as may be required for official use. Under present law, §4(e) requires the Department to return to the person documents (including copies supplied pursuant to §4(b)) upon the completion of any case or investigation, but excluding copies made pursuant to §4(c). The Department of Justice believes that this framework has worked well in the past and should not be changed. Requiring the return of copies made pursuant to §4(c) would create severe administrative burdens (i.e. tracing down all copies, deleting excerpted portions from internal Departmental documents, etc.). The Department opposes this amendment.

Sincerely,

Thomas E. Kauper

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

MAR 1975

Senator Philip A. Hart
Chairman
Subcommittee on Antitrust and Monopoly
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Hart:

Your office has asked for the views of the Department on an amendment that may be offered to Title II of S. 1284 during consideration of the bill by the Committee on the Judiciary. That particular amendment would require the Department of Justice to obtain a court order before a CID could be issued to any person not under investigation.

The Department strongly opposes this amendment. - Hart's amend. no. 2

Title II in its present form does not vary materially from the Administration bill to amend the Antitrust Civil Process Act. When that bill was drafted, the Administration considered very carefully the necessary scope of investigative powers and the appropriate procedural safeguards to protect against governmental overreaching. Given the rights accorded to third parties under Title II of S. 1284, we do not believe that a case has been made for injecting the judicial process into the issuance process of CIDs, particularly when no objection to existing procedure has been made.

If, notwithstanding Administration opposition, the Committee believes that a court order should be required for issuance of a CID to a third party, the Department would still oppose any amendment that imposed an unrealistic burden on issuance of such a CID. The amendment that has been submitted to us would, in our view, impose a burden that would significantly impair the usefulness of this authority in antitrust investigations.

The amendment would require the Department to file a verified petition with the appropriate United States District Court. The petition must contain a statement that "the same or similar information is unavailable from other sources within the United States Government or from the person under investigation." This standard is inappropriate for two reasons. First, in an antitrust investigation, particularly into contemplated mergers, time is often of the essence. In the interests of time, it may be necessary to contact third parties known to have important information before completion of any attempt to canvas all governmental data-gathering agencies. Second, this standard would require the Department to contact all persons under investigation before third parties could be contacted. In many instances it will be important that we be able to obtain relevant information from third parties before persons under investigation become aware of our activities. This provision of the amendment would fundamentally disrupt the sequence of many of our investigations.

The verified petition would also have to contain the statement that the evidence sought is "necessary" to our investigation. Since the presently operative standard is one of "relevance," 15 U.S.C. §1312(a), it would appear that this amendment is intended to impose a higher standard than now exists. Since there has been no showing of abuse to date, we would oppose any such modification.

These objections to the criteria established for the verified petition apply equally well to the substantive standards pursuant to which District Courts will evaluate the request since the same factors are embodied in those standards.

We also believe that a defendant's access to CID materials should be determined by the Federal Rules of Civil Procedure, as is presently mandated by the Antitrust Civil Process Act, rather than by a blanket access provision, such as that contained in the proposed amendment, that may not take into account legitimate concerns about prejudicial disclosure.

If we may be of any further assistance, please do not hesitate to contact us.

Sincerely,

Thomas E. Kauper

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

April 5, 1976

Honorable James O. Eastland
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On March 10, 1976, the Department of Justice indicated its opposition to an amendment to Title II of S. 1284, which would have required an award of reasonable expenses, apparently including production costs as well as attorneys fees, to recipients of civil investigative demands who are not themselves targets of the investigation. At the Executive Session held on that day, the Committee on the Judiciary tentatively adopted a modified version of this amendment, which would become §3(j)(5) of the Antitrust Civil Process Act, and appears on page 47 of the recent Committee Print.

The Department has given careful consideration to the arguments advanced in support of this amendment but continues to believe strongly that this amendment is unprecedented and could frustrate the effective utilization of the very powers that Title II is designed to confer. Furthermore, to the extent that the possibility exists that very expensive demands may be made of third parties, Title II presently contains appropriate safeguards that are more responsive to the problem and yet less intrusive upon legitimate law enforcement objectives.

Federal Rule of Civil Procedure 45(c) and Federal Rule of Criminal Procedure 17(d) presently provide for the payment of witness fees and mileage costs to the recipient of a subpoena. The Department of Justice does not oppose incorporation of a similar provision in Title II. Such a provision would not only bring the Antitrust Civil Process Act into conformity with post-complaint procedure, but it would also be consistent with the obligations of the Federal Trade Commission in similar circumstances. See 15 U.S.C. §49.

Different problems are presented with regard to demands for documentary materials. The Federal Rules of Criminal Procedure provide that a subpoena for the production of documentary evidence may be quashed or modified "if compliance would be unreasonable or oppressive." Rule 17(c). The Federal Rules of Civil Procedure are slightly different. Under Rule 45(b), a court may (1) quash or modify an "unreasonable and oppressive" subpoena or (2) condition denial of the motion to quash upon the advancement of "the reasonable cost" of compliance.

In practical effect, such a standard is already embodied in Title II. Section (g) of Title II provides that no demand for the production of documentary material shall contain "any requirement which would be held unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation." Therefore, if a recipient of a civil investigative demand believes that a demand is unreasonable, he may either file a petition in court to quash the demand or decline to comply and await enforcement efforts by the Department.

To the extent that the recipient of a civil investigative demand concludes that the demand is reasonable but would prefer not to comply for whatever reason, existing law provides no relief. I am aware of no reason, however, why persons with information relevant to an antitrust violation should be under a lesser duty to cooperate with law enforcement agencies than citizens generally. Traditionally, the responsibilities of citizenship have been thought to include cooperation with law enforcement officials. If a case is to be made for payment of all such expenses, what is required is a broad reassessment of this problem as it arises generally in the context of law enforcement rather than incorporation of new and unique payment schemes in this pending and very limited legislation, especially at this stage of the legislative process.

Adoption of such an amendment, in addition to compensating persons for their cooperation with the Department, would also discourage people from cooperating voluntarily. Since enactment of the Antitrust Civil Process Act of 1962, the Department has often been able to secure documentary material on a voluntary

basis, without resort to the civil investigative demand, and thereby avoided unnecessary formality and rigidity. Adoption of an amendment to Title II that would require a payment of expenses arising from the issuance of a civil investigative demand would cause persons to cease cooperating voluntarily -- because they would prefer to receive a formal demand and thus qualify for appropriate compensation.

Our review of other statutes and court rules, available protections presently incorporated in Title II, and existing practice under the Act leads us to conclude that, except for payment of witness fees and mileage costs, the amendment to add §3(j)(5) to the Act is unwarranted and counterproductive.

Sincerely yours,

Thomas E. Kauper

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

April 5, 1976

Honorable Edward M. Kennedy
United States Senate
Washington, D. C. 20510

Dear Senator Kennedy:

At a recent executive session of the Senate Judiciary Committee, you requested the views of the Department of Justice regarding a proposed amendment to Title II of S. 1284 that would require the Department to return all copies it makes of documents submitted pursuant to a civil investigative demand, at the conclusion of an investigation.

Under present law, the Department is specifically authorized to make copies of documentary material submitted pursuant to a civil investigative demand, §4(c) of the Antitrust Civil Process Act, 15 U.S.C. §1313(c). At the conclusion of an investigation or a case arising therefrom, the Department is required to return materials to the person who produced them; however, §4(e) of the Act, 15 U.S.C. §1313(e), specifically states that the Department is not required to return copies of documents that it has made pursuant to §4(c).

The Department presently puts those copies to many different uses. Certain kinds of information submitted may be retained in Department case files. Other information may be utilized by attorneys working on a related or similar matter. Some information is retained to provide a basis for the development of expertise about particular industries and practices; this has been true in the patent field, where standardized contracts and unique terminology are common to the field but unfamiliar to antitrust attorneys. In many instances, however, document copies are simply retained for a reasonable period in the regular course of business and then routinely disposed of.

The Department of Justice strongly believes that existing procedures have worked well and should be retained. There is no doubt that the flexibility of current procedures has proved useful. Quite importantly, there is

to our knowledge neither evidence of abuse nor indications of concern by the business community regarding present practice.

It is important to note that this practice does not result in any inconvenience or prejudice to companies that have submitted documentary material. The Department is required by statute to return all original documents submitted by a company (and copies submitted in lieu of originals). This assures that there will be no disruption of business operations.

Conversely, a requirement that the Department return all copies made of documents submitted pursuant to a civil investigative demand would impose enormous administrative burdens upon the Department. Such an amendment would create an affirmative responsibility to monitor the disposition and use of such copies and to provide for retrieval upon completion of a case or investigation. While administrative inconvenience should not ordinarily be a determinative factor in assessing the advisability of a legislative safeguard, in the absence of any showing of need or history of abuse we believe that such interests should be weighed appropriately.

The simple fact is that what we are dealing with here is business information, and information once received by the Department and utilized by the Department cannot be totally purged from the minds, the memoranda or the institutional memory of the Department or its employees. For example, following a CID investigation, a fact memo will commonly be prepared containing staff recommendations. Most of the relevant information obtained during the CID investigation will be summarized or cited in this and related memoranda.

Absent a requirement to remove all references to this information from these memoranda, a practice which would be absolutely unworkable, a requirement to return all copies of CID documents is nothing more or less than a requirement to return pieces of paper, and as such, is little more than a costly symbol. Because of the type of information involved here, the procedures which might be deemed desirable or necessary when dealing with personal, "dossier-type" information are, in the Department's view, simply inapplicable.

If we may be of any further assistance to you on this or any other matter relating to S. 1284, please feel free to contact me.

Sincerely yours,

Thomas E. Kauper

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

HYSTER COMPANY, Appellant,
v.
UNITED STATES of America, Appellee.
No. 19168.

United States Court of Appeals
Ninth Circuit.
Nov. 4, 1964.

Corporation attacked constitutionality of the Antitrust Civil Process Act and of civil investigative demand issued under the Act and served on the corporation. The United States District Court for the District of Oregon, Gus J. Solomon, J., entered judgment adverse to the corporation, and the corporation appealed. The Court of Appeals, Duniway, Circuit Judge, held that the demand was not an unlawful search and seizure in violation of the Fourth Amendment to the Federal Constitution.

Affirmed.

1. Monopolies ⟹10

Antitrust Civil Process Act is not unconstitutional because Attorney General, whose duties include prosecution, is party on whom power to make civil investigative demand is conferred. Antitrust Civil Process Act, §§ 1–5, 15 U.S.C.A. §§ 1311–1314.

2. Searches and Seizures ⟹7(1)

Civil investigative demand under Antitrust Civil Process Act is not unreasonable search and seizure in violation of Fourth Amendment to Federal Constitution. Antitrust Civil Process Act, § 5(a, b, d, e), 15 U.S.C.A. § 1314 (a, b, d, e); Fed.Rules Civ.Proc. rules 30(b), 34, 28 U.S.C.A.; U.S.C.A.Const. Amend. 4.

3. Witnesses ⟹293

Civil investigative demand issued under the Antitrust Civil Process Act and served on corporation did not violate provision of the Fifth Amendment to the Federal Constitution that no person shall be compelled in any criminal case to be a witness against himself, since a corporation has no privilege against self-incrimination and cannot assert privilege on behalf of someone else. Antitrust Civil Process Act, §§ 1–5, 15 U.S.C.A. §§ 1311–1314; U.S.C.A.Const. Amend. 5.

4. Monopolies ⟹24(2)

Civil investigative demand which stated that it was issued pursuant to the provisions of the Antitrust Civil Process Act was not required to state that corporation, on which demand was served, was under investigation. Antitrust Civil Process Act, §§ 2(f), 3(a), 15 U.S.C.A. §§ 1311(f), 1312(a).

Guy J. Rappleyea, Black & Apicella, Portland, Or., L. M. McBride, McBride, Baker, Wienke & Schlosser, Chicago, Ill., for appellant.

William H. Orrick, Jr., Asst. Atty. Gen., Irwin A. Seibel, Dept. of Justice, Washington, D. C., for appellee.

Before CHAMBERS, JERTBERG and DUNIWAY, Circuit Judges.

DUNIWAY, Circuit Judge.

Hyster Company attacks the constitutionality of the Antitrust Civil Process Act (76 Stat. 548, 15 U.S.C. §§ 1311–1314, Supp. 4, (1963)), and of a "civil investigative demand" issued under the Act and served upon Hyster. It also is claimed that the demand is invalid for non-compliance with the Act. The trial court upheld the Act and the demand in all respects. We are affirming.

The action was brought under section 5(b) of the Act (15 U.S.C. § 1314(b)). The petition has attached to it a copy of the demand, and alleges that it was received by Hyster on April 16, 1963, by registered mail.[1] Hyster then proceeds to allege various grounds upon which it contends that the demand is invalid.[2] Certain of these were abandoned at the hearing. On this appeal, Hyster asserts:

1. That the Act violates the Fourth Amendment to the Constitution "because any civil investigative demand issuable thereunder is a form of compulsory process, and the permitted and authorized circumstances under which such a demand can be issued, the manner in which it can be served and employed, the scope of the documentary material which may be called for, the purposes for which it can be employed and the subsequent use to which the documentary material thus obtained can be put, alone and cumulatively, constitute an unlawful search and seizure."

2. The demand is an unlawful search and seizure, for the same reasons, and thus violates the Fourth Amendment.

3. The demand violates the Fifth Amendment[3] to the Constitution "Because the Demand * * * would require implicit testimony by the executives and employees of Hyster in the process of making a selection of documentary material in response to the Demand without the opportunity of gaining immunity against self-incrimination under the Fifth Amendment * * * and for the same reasons, the said executives and employees would be denied the protection of the immunity provisions of 15 U.S.C. Secs. 32–33."

4. The demand does not comply with the Act. The grounds are, as nearly as we can gather from the briefs:

(a) That there is no showing that Hyster is "under investigation" (§ 3 (a) and (b) (1), 15 U.S.C. § 1312(a) and (b) (1));[4]

(b) that there is no sufficient statement of the "nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable thereto" (§ 3(b) (1), 15 U.S.C. § 1312(b) (1));

(c) that there is no sufficient description of "the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified" (§ 3(b) (2), 15 U.S.C. § 1312(b) (2));[5]

1. This is authorized by section 3(e) (3) of the Act (15 U.S.C. § 1312(e) (3)).

2. No attempt was made to show, by evidence, that the requirements of the demand are unreasonable, or otherwise invalid. The attack is upon the demand as being improper on its face.

3. That portion which reads "nor shall [any person] be compelled in any criminal case to be a witness against himself * * *."

4. The demand does not state that Hyster is under investigation. It recites: "This civil investigative demand is issued pursuant to the provisions of the Antitrust Civil Process Act, 76 Stat. 548–552, Title 15 United States Code Secs. 1311–1314, in the course of an inquiry for the purpose of ascertaining whether there is or has been a violation of the provisions of Title 15 United States Code Secs. 1 and 2 by conduct of the following nature: concerted action with manufacturers of tractor equipment, accessories and parts to control production and distribution, and restrictions upon pricing and distribution of those products."

5. The documents are described in a "Schedule" reading as follows:

"As used herein the following terms shall have the meaning indicated:

" 'The Company' means that company upon which this Demand is served, its subsidiaries, affiliates, and predecessor companies;

" 'Documents' means papers, writings, or other records, of any nature whatsoever, in possession, custody or control of The Company, which record information responsive to that requested in this Demand.

"*Documents To Be Made Available*

"For the period January 1, 1958 to date, unless otherwise indicated:

"1. Documents which name or describe equipment, accessories, and replacement

(d) that it does "require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena * * * in aid of a grand jury investigation * * *." (§ 3(c) (2), 15 U.S.C. § 1312(c) (2)).

Arguments similar to those urged in support of grounds 1, 4(b), 4(c) and 4 (d) were considered at length by Judge Nordbye in a proceeding involving a comparable demand, Petition of Gold Bond Stamp Company, D.C.Minn., 1963, 221 F.Supp. 391. He rejected them.

parts currently sold in connection with The Company's tractor operations.

"2. Documents which show The Company's annual sales and shipments of tractor equipment, accessories and replacement parts, in terms of units and dollar value.

"3. Documents which disclose the names and addresses of the ten largest purchasers of tractor equipment, accessories and parts from The Company, in terms of dollar sales.

"4. Contracts, agreements, and correspondence or other documents reflecting agreements or understandings, currently in effect between The Company and producers of tractors or tractor parts, or among them, including but not limited to the Caterpillar Tractor Company, Peoria, Illinois, together with memoranda or other documents construing or discussing operation of such contracts, agreements, and understandings.

"5. Documents which refer or relate to consultations, negotiations, or discussions between The Company and Caterpillar Tractor Company, or with other producers of tractors or tractor parts, relative to entering into, carrying out, setting the terms of, or terminating franchise agreements between The Company and any dealer or distributor of The Company's products, or between any tractor or tractor parts producer and its dealers.

"6. Documents which discuss The Company's advertising policies as designed to affect operations by other manufacturers or independent dealers in tractor replacement parts, and communications with advertising media, or documents pertinent thereto, which relate or refer to acceptance or refusal by trade journals and other publications of advertising copy from such manufacturers or dealers.

"7. Price lists and pricing analyses utilized, since January 1, 1956, by The Company in marketing its tractor equipment, accessories and replacement parts at any level of distribution, together with documents which discuss policies or practices in connection with establishing, changing, maintaining, or enforcing prices for said equipment, accessories or parts at any level of distribution.

"8. Documents which disclose the names and addresses of current distributors and dealers for The Company's tractor equipment, accessories, and replacement parts, and documents which identify dealerships terminated since January 1, 1956.

"9. Franchise agreements, currently in effect, with distributors or dealers handling The Company's tractor equipment, accessories or replacement parts; to the extent that such agreements are uniform, representative copies of each type, together with indication of the specific dealers which are parties thereto, will suffice.

"10. Documents which relate or refer to formulating the terms of, carrying out, or terminating any franchise agreement or contract between The Company and distributors or dealers in tractor equipment, accessories or parts.

"11. Documentary communications, directives and memoranda exchanged between and among executive and supervisory personnel of The Company, with particular reference to policy memoranda and departmental reports, relative to tractor equipment, accessories or parts, as follows:

"a. Financial arrangements with dealers, including extensions of credit, collections of commissions from dealers for payment to other dealers, prices charged by dealers and inducements designed to promote exclusive dealerships.

"b. Territorial limitations within which individual dealers may operate without surrendering commissions or other rights, in whole or in part.

"c. Conditions upon which The Company's franchised dealers may handle tractor equipment, accessories or parts produced or sold by companies other than The Company.

"d. Methods of enforcement or surveilance [sic] of dealers utilized by The Company to assure dealer operations in accordance with their contractual or understood obligations to The Company.

"12. Documents which identify personnel or committees within The Company responsible for initiating, setting, maintaining or publishing price changes, since January 1, 1956 in connection with sales of tractor equipment, accessories or parts at any level of distribution."

His decision was unanimously affirmed by the Court of Appeals for the Eighth Circuit, "on the basis of his opinion," which was said to contain an "excellent and comprehensive analysis of the Act." Gold Bond Stamp Company v. United States, 8 Cir., 1964, 325 F.2d 1018. We agree with that decision. We can see no benefit to be gained by anyone from an opinion by us restating the same conclusions.

[1] In this case, Hyster makes much of the fact that the Attorney General, whose duties include prosecution, is the party on whom the power to demand is conferred. The theory is that while it may be proper to confer such authority upon the Federal Trade Commission (e. g., United States v. Morton Salt Co., 1950, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401), or the Administrator of the Wage and Hour Division of the Department of Labor (e. g., Oklahoma Press Pub. Co. v. Walling, 1946, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614), or on other "quasi-judicial" or "administrative" bodies or officers, it is not proper to confer it upon the Attorney General.

We are not convinced. The F.T.C. and the Administrator have investigative and enforcement powers and duties, primarily civil in nature. So do many other commissions and administrators. (See 1 Davis, Administrative Law, § 3.03 (1958)) So does the Attorney General under the antitrust laws. (15 U.S.C. §§ 4, 9, 25) He also has the duty to institute prosecutions. We have no doubt that it is within the power of administrators or administrative boards or commissions, if in the course of authorized investigations they uncover evidence of the commission of crimes, to refer that evidence to the Attorney General. In some cases, Congress has expressly conferred such authority. (E. g., The Emergency Price Control Act of 1942, 56 Stat. 23, § 205(b), 56 Stat. 33) In our case the Act, section 4(d) (15 U.S.C. § 1313(d)) authorizes delivery of documents to an attorney authorized to appear before a grand jury in a proceeding involving antitrust violations. The fact that the Attorney General can himself institute a prosecution, instead of referring the information to someone else, may be a distinction, but we do not think that it makes a constitutional difference. He is still a public officer, exercising functions conferred upon him by law. There is no presumption that he will abuse his powers, quite the contrary, and there certainly is no showing that he is doing so in this case.

[2] Ground 2 is based upon the same reasons as ground 1, and we likewise reject it. We would add that the demand is enforcible only in a judicial proceeding brought either by the Attorney General or the person served (section 5(a), (b), (d), 15 U.S.C. § 1314(a), (b), (d)).[6] Moreover, section 5(e) (15 U.S.C. § 1314 (e)) makes the Federal Rules of Civil Procedure applicable to any petition under the Act. Thus there is available to Hyster, in a petition to modify or set aside the demand, the safeguards afforded by rules 34 and 30(b). The court has a broad discretion to protect Hyster from an unreasonable demand. And it is only "unreasonable" searches and seizures to which the Fourth Amendment refers. We do not find the demand unreasonable on its face, and Hyster has made no attempt to show that it is unreasonable in its actual application to Hyster. (Cf. Hunt Foods and Industries, Inc. v. F.T.

6. The demand refers to, and quotes, 18 U.S.C. § 1505, the pertinent portions of which read:

"Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand * * *. [S]hall be fined not more than $5,000 or imprisoned not more than five years, or both. * * *"

This does not make ordinary failure to comply an offense.

C., 9 Cir., 1961, 286 F.2d 803, 810–812, where such a showing was made and an F.T.C. subpoena was modified by consent, accepted by the court, and enforced as so modified.)

[3] As to ground 3, we note that Hyster is the only party before the court. As a corporation, it has no privilege against self-incrimination. Hale v. Henkle, 1906, 201 U.S. 43, 74–75, 26 S.Ct. 370, 50 L.Ed. 652; Baltimore & Ohio R. R. v. I.C.C., 1911, 221 U.S. 612, 622, 31 S.Ct. 621, 55 L.Ed. 878; Wilson v. United States, 1911, 221 U.S. 361, 382–384, 31 S.Ct. 538, 55 L.Ed. 771. It cannot assert the privilege on behalf of someone else. Hale v. Henkle, supra, 201 U.S. at 69–70, 26 S.Ct. 370; Rogers v. United States, 1951, 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344. Moreover, for all that appears, there may be responsible officers or employees of Hyster who could do the necessary work of selecting the required documents without incriminating themselves even in the rather nebulous manner that Hyster conjures up, because they personally had nothing to do with the transactions to which the documents relate. We note, too, that the demand does not, and cannot under the Act, contain an *ad testificandum* clause. On its face, it does not compel anyone to be a witness, much less a witness against himself.

[4] There remains ground 4(a). Under the Act, the demand can be served only on a "corporation, association, partnership, or other legal entity not a natural person" (section 2(f), 15 U.S.C. § 1311(f)) which is "under investigation" (section 3(a), 15 U.S.C. § 1312(a)). The Act does not require that the demand state that the addressee is "under investigation." The demand does state that it "is issued pursuant to the provisions of" the Act. (Footnote 4, supra) We think this a sufficient allegation. Hyster does not allege that it is not under investigation. There is a presumption that a public officer is acting lawfully. We have applied it in closely analogous situations. Bowles v. Northwest Poultry & Dairy Products Co., 9 Cir., 1946, 153 F.2d 32, 34; Hagen v. Porter, 9 Cir., 1946, 156 F.2d 362, 364–365. We see no reason for not applying it here.

Affirmed.

HANNAH ET AL. *v.* LARCHE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA.

No. 549. Argued January 18–19, 1960.—Decided June 20, 1960.*

The Civil Rights Act of 1957 created in the Executive Branch of the Government a Commission on Civil Rights to investigate written, sworn allegations that persons have been discriminatorily deprived of their right to vote on account of their color, race, religion or national origin, to study and collect information "concerning legal developments constituting a denial of equal protection of the laws," and to report to the President and Congress. The Commission is authorized to subpoena witnesses and documents and to conduct hearings. The Act prescribes certain rules of procedure; but nothing in the Act requires the Commission to afford persons accused of discrimination the right to be apprised as to the specific charges against them or as to the identity of their accusers, or the right to confront and cross-examine witnesses appearing at Commission hearings; and the Commission prescribed supplementary rules of procedure which deny such rights in hearings conducted by it. *Held:*

1. In the light of the legislative history of the Act, the Commission was authorized by Congress to adopt such rules of procedure. Pp. 430–439.

2. Since the Commission makes no adjudications but acts solely as an investigative and fact-finding agency, these rules of procedure do not violate the Due Process Clause of the Fifth Amendment. *Morgan* v. *United States*, 304 U. S. 1; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Greene* v. *McElroy*, 360 U. S. 474, distinguished. Pp. 440–452.

3. Such rules of procedure do not violate the Sixth Amendment, since that Amendment is specifically limited to "criminal prosecutions," and the proceedings of the Commission do not fall in that category. P. 440, n. 16.

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*Together with No. 550, *Hannah et al.* v. *Slawson et al.*, on petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

4. The Civil Rights Act of 1957 is appropriate legislation under the Fifteenth Amendment. P. 452.

5. Section 7 of the Administrative Procedure Act is not applicable to hearings conducted by this Commission. Pp. 452–453.

177 F. Supp. 816, reversed.

Deputy Attorney General Walsh argued the causes for appellants in No. 549 and petitioners in No. 550. On the brief were *Solicitor General Rankin, Acting Assistant Attorney General Ryan, Philip Elman, Harold H. Greene* and *David Rubin.*

Jack P. F. Gremillion, Attorney General of Louisiana, argued the cause for appellees in No. 549. With him on the brief were *George M. Ponder,* First Assistant Attorney General, and *Albin P. Lassiter.*

W. M. Shaw argued the cause and filed a brief for respondents in No. 550.

Mr. Chief Justice Warren delivered the opinion of the Court.

These cases involve the validity of certain Rules of Procedure adopted by the Commission on Civil Rights, which was established by Congress in 1957.[1] Civil Rights Act of 1957, 71 Stat. 634, 42 U. S. C. §§ 1975–1975e. They arise out of the Commission's investigation of alleged Negro voting deprivations in the State of Louisiana. The appellees in No. 549 are registrars of voters in the State of Louisiana, and the respondents in No. 550 are private citizens of Louisiana.[2] After having been summoned to

[1] Although the Civil Rights Act of 1957 provided that the Commission should cease to exist within two years after its creation, 71 Stat. 635, 42 U. S. C. § 1975c, in 1959 Congress extended the Commission's life for an additional two years. 73 Stat. 724.

[2] The appellants in No. 549 and the petitioners in No. 550 are the individual members of the Civil Rights Commission. Hereinafter,

appear before a hearing which the Commission proposed to conduct in Shreveport, Louisiana, these registrars and private citizens requested the United States District Court for the Western District of Louisiana to enjoin the Commission from holding its anticipated hearing. It was alleged, among other things, that the Commission's Rules of Procedure governing the conduct of its investigations were unconstitutional. The specific rules challenged are those which provide that the identity of persons submitting complaints to the Commission need not be disclosed, and that those summoned to testify before the Commission, including persons against whom complaints have been filed, may not cross-examine other witnesses called by the Commission. The District Court held that the Commission was not authorized to adopt the Rules of Procedure here in question, and therefore issued an injunction which prohibits the Commission from holding any hearings in the Western District of Louisiana as long as the challenged procedures remain in force. The Commission requested this Court to review the District Court's decision.[3] We granted the Commission's motion to advance the cases, and oral argument was accordingly scheduled on the jurisdiction on appeal in No. 549, on the petition for certiorari in No. 550, and on the merits of both cases.

Having heard oral argument as scheduled, we now take jurisdiction in No. 549 and grant certiorari in No.

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they will be referred to as "the Commission." The appellees in No. 549 and the respondents in No. 550 will both hereinafter be referred to as "respondents."

[3] Because No. 549 was heard and decided by a three-judge District Court, a direct appeal to this Court was sought by the Commission pursuant to 28 U. S. C. § 1253. The Commission also filed an appeal in No. 550 with the United States Court of Appeals for the Fifth Circuit. However, before the Court of Appeals could render a decision in No. 550, the Commission filed a petition for certiorari pursuant to Rule 20 of this Court.

550. The specific questions which we must decide are (1) whether the Commission was authorized by Congress to adopt the Rules of Procedure challenged by the respondents, and (2) if so, whether those procedures violate the Due Process Clause of the Fifth Amendment.

A description of the events leading up to this litigation is necessary not only to place the legal questions in their proper factual context, but also to indicate the significance of the Commission's proposed Shreveport hearing. During the months prior to its decision to convene the hearing, the Commission had received some sixty-seven complaints from individual Negroes who alleged that they had been discriminatorily deprived of their right to vote. Based upon these complaints, and pursuant to its statutory mandate to "investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin," [4] the Commission began its investigation into the Louisiana voting situation by making several *ex parte* attempts to acquire information. Thus, in March 1959, a member of the Commission's staff interviewed the Voting Registrars of Claiborne, Caddo, and Webster Parishes, but obtained little relevant information. During one of these interviews the staff member is alleged to have informed Mrs. Lannie Linton, the Registrar of Claiborne Parish, that the Commission had on file four sworn statements charging her with depriving Negroes of their voting rights solely because of their race. Subsequent to this interview, Mr. W. M. Shaw, Mrs. Linton's personal attorney, wrote a letter to Mr. Gordon M. Tiffany, the Staff Director of the Commission, in which it was asserted that Mrs. Linton knew the sworn complaints lodged against

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[4] Section 104 of the Civil Rights Act of 1957, 71 Stat. 635, 42 U. S. C. § 1975c (a)(1).

her to be false. The letter also indicated that Mrs. Linton wished to prefer perjury charges against the affiants, and Mr. Shaw therefore demanded that the Commission forward to him copies of the affidavits so that a proper presentment could be made to the grand jury. On April 14, 1959, Mr. Tiffany replied to Mr. Shaw's letter and indicated that the Commission had denied the request for copies of the sworn affidavits. Mr. Shaw was also informed of the following official statement adopted by the Commission:

> "The Commission from its first meeting forward, having considered all complaints submitted to it as confidential because such confidentiality is essential in carrying out the statutory duties of the Commission, the Staff Director is hereby instructed not to disclose the names of complainants or other information contained in complaints to anyone except members of the Commission and members of the staff assigned to process, study, or investigate such complaints."

A copy of Mr. Tiffany's letter was sent to Mr. Jack P. F. Gremillion, the Attorney General of Louisiana, who had previously informed the Commission that under Louisiana law the Attorney General is the legal adviser for all voting registrars in any hearing or investigation before a federal commission.

Another attempt to obtain information occurred on May 13, 1959, when Mr. Tiffany, upon Commission authorization, sent a list of 315 written interrogatories to Mr. Gremillion. These interrogatories requested very detailed and specific information, and were to be answered by the voting registrars of nineteen Louisiana parishes. Although Mr. Gremillion and the Governor of Louisiana had previously assented to the idea of written interrogatories, on May 28, 1959, Mr. Gremillion sent a letter to

Mr. Tiffany indicating that the voting registrars refused to answer the interrogatories. The reasons given for the refusal were that many of the questions seemed unrelated to the functions of voting registrars, that the questions were neither accompanied by specific complaints nor related to specific complaints, and that the time and research required to answer the questions placed an unreasonable burden upon the voting registrars.

In response to this refusal, on May 29, 1959, Mr. Tiffany sent a telegram to Mr. Gremillion, informing the latter that the interrogatories were based upon specific allegations received by the Commission, and reaffirming the Commission's position that the identity of specific complainants would not be disclosed. Mr. Tiffany's letter contained a further request that the interrogatories be answered and sent to the Commission by June 5, 1959. On June 2, 1959, Mr. Gremillion wrote a letter to Mr. Tiffany reiterating the registrars' refusal, and again requesting that the names of complainants be disclosed.

Finally, as a result of this exchange of correspondence, and because the Commission's attempts to obtain information *ex parte* had been frustrated, the Commission, acting pursuant to Section 105 (f) of the Civil Rights Act of 1957,[5] decided to hold the Shreveport hearing commencing on July 13, 1959.

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[5] Section 105 (f) of the Civil Rights Act authorizes the Commission to hold hearings and to subpoena witnesses. That section provides:

"(f) *Hearings; issuance of subpenas.*

"The Commission, or on the authorization of the Commission any subcommittee of two or more members, at least one of whom shall be of each major political party, may, for the purpose of carrying out the provisions of this Act, hold such hearings and act at such times and places as the Commission or such authorized subcommittee may deem advisable. Subpenas for the attendance and testimony of witnesses or the production of written or other matter may be issued in accordance with the rules of the Commission as contained in sec-

Notice of the scheduled hearing was sent to Mr. Gremillion, and between June 29 and July 6, subpoenas *duces tecum* were served on the respondents in No. 549, ordering them to appear at the hearing and to bring with them various voting and registration records within their custody and control. Subpoenas were also served upon the respondents in No. 550. These private citizens were apparently summoned to explain their activities with regard to alleged deprivations of Negro voting rights.[6]

On July 8, 1959, Mr. Tiffany wrote to Mr. Gremillion, enclosing copies of the Civil Rights Act and of the Commission's Rules of Procedure.[7] Mr. Gremillion's attention was also drawn to Section 102 (h) of the Civil Rights Act, which permits witnesses to submit, subject to the discretion of the Commission, brief and pertinent sworn statements for inclusion in the record.[8]

Two days later, on July 10, 1959, the respondents in No. 549 and No. 550 filed two separate complaints in the Dis-

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tion 1975a (j) and (k) of this title, over the signature of the Chairman of the Commission or of such subcommittee, and may be served by any person designated by such Chairman." 71 Stat. 636, 42 U. S. C. § 1975d (f).

[6] The role of private citizens in depriving Negroes of their right to vote was one of the questions involved in *United States* v. *McElveen*, 180 F. Supp. 10 (E. D. La.), aff'd as to defendant Thomas, 362 U. S. 58.

[7] Rule 3 (i) of the Commission's Rules of Procedure, adopted on July 1, 1958, prohibits witnesses or their counsel from cross-examining other witnesses. That Rule reads:

"Interrogation of witnesses at hearings shall be conducted only by members of the Commission or by authorized staff personnel."

[8] The full text of Section 102 (h) of the Civil Rights Act reads as follows:

"(h) *Submission of written statements.*

"In the discretion of the Commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission is the sole judge of the pertinency of testimony and evidence adduced at its hearings." 71 Stat. 634, 42 U. S. C. § 1975a (h).

trict Court for the Western District of Louisiana. Both complaints alleged that the respondents would suffer irreparable harm by virtue of the Commission's refusal to furnish the names of persons who had filed allegations of voting deprivations, as well as the contents of the allegations, and by its further refusal to permit the respondents to confront and cross-examine the persons making such allegations. In addition, both complaints alleged that the Commission's refusals not only violated numerous provisions of the Federal Constitution, but also constituted "ultra vires" acts not authorized either by Congress or the Chief Executive. The respondents in No. 549 also alleged that they could not comply with the subpoenas *duces tecum* because Louisiana law prohibited voting registrars from removing their voting records except "upon an order of a competent court," and because the Commission was not such a "court." Finally, the complaint in No. 549 alleged that the Civil Rights Act was unconstitutional because it did not constitute "appropriate legislation within the meaning of Section (2) of the XV Amendment."

Both complaints sought a temporary restraining order and a permanent injunction prohibiting the members of the Commission (a) from compelling the "testimony from or the production of any records" by the respondents until copies of the sworn charges, together with the names and addresses of the persons filing such charges were given to the respondents; [9] (b) from "conducting any hearing pursuant to the rules and regulations adopted by" the Commission; and (c) from "conspiring together . . . or with any other person . . . to deny complainants their rights and privileges as citizens" of Louisiana or the

[9] Under the Civil Rights Act, the Commission not only has the power to issue subpoenas under Section 105 (f), but, as is customary when Congress confers the subpoena power on an investigative agency, the Commission is also authorized to enforce its subpoenas by enlisting the aid of the federal courts. 71 Stat. 636, 42 U. S. C. § 1975d (g).

United States "or to deny to complainants their right to be confronted by their accusers, to know the nature and character of the charges made against them," and to be represented by counsel. The complaint in No. 549 also sought a declaratory judgment that the Civil Rights Act of 1957 was unconstitutional.

On the day that the complaints were filed, the district judge held a combined hearing on the prayers for temporary restraining orders. On July 12, 1959, he found that the respondents would suffer irreparable harm if the hearings were held as scheduled, and he therefore issued the requested temporary restraining orders and rules to show cause why a preliminary injunction should not be granted. *Larche* v. *Hannah*, 176 F. Supp. 791. The order prohibited the Commission from holding any hearings which concerned the respondents or others similarly situated until a determination was made on the motion for a preliminary injunction.

Inasmuch as the complaint in No. 549 attacked the constitutionality of the Civil Rights Act, a three-judge court was convened pursuant to 28 U. S. C. § 2282. Since the complaint in No. 550 did not challenge the constitutionality of the Civil Rights Act of 1957, that case was scheduled to be heard by a single district judge. That district judge was also a member of the three-judge panel in No. 549, and a combined hearing was therefore held on both cases on August 7, 1959.

On October 7, 1959, a divided three-judge District Court filed an opinion in No. 549. *Larche* v. *Hannah*, 177 F. Supp. 816. The court held that the Civil Rights Act of 1957 was constitutional since it "very definitely constitutes appropriate legislation" authorized by the Fourteenth and Fifteenth Amendments and Article I, Section 2, of the Federal Constitution. *Id.*, at 821. The court then held that since the respondents' allegations with regard to apprisal, confrontation, and cross-examination

raised a "serious constitutional issue," this Court's decision in *Greene* v. *McElroy,* 360 U. S. 474, required a preliminary determination as to whether Congress specifically authorized the Commission "to adopt rules for investigations . . . which would deprive parties investigated of their rights of confrontation and cross-examination and their right to be apprised of the charges against them." 177 F. Supp., at 822. The court found that Congress had not so authorized the Commission, and an injunction was therefore issued. In deciding the case on the issue of authorization, the court never reached the "serious constitutional issue" raised by the respondents' allegations.[10] The injunction prohibits the Commission from holding any hearing in the Western District of Louisiana wherein the registrars, "accused of depriving others of the right to vote, would be denied the right of apprisal, confrontation, and cross examination." [11] The single dis-

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[10] Judge Wisdom, who dissented, was of the opinion that the procedures adopted by the Commission were authorized by Congress, and that those procedures were also constitutional. 177 F. Supp., at 828.

[11] The court's injunction reads as follows:

"For reasons assigned in the Court's written opinion of October 6, 1959,

"It is ordered, adjudged and decreed that defendants and their agents, servants, employees and attorneys are enjoined and restrained from conducting the proposed hearing in Shreveport, Louisiana, wherein plaintiff registrars, accused of depriving others of the right to vote, would be denied the right of apprisal, confrontation and cross examination.

"This injunction does not prohibit all hearings pursuant to Public Law 85–315, 85th Congress, 42 U. S. C. A. 1975, et seq., but only those hearings proposed to be held in the Western District of Louisiana wherein the accused are denied the right of apprisal, confrontation and cross examination.

"Thus done and signed in Chambers on this the 9 day of November, 1959."

The breadth of this injunction is indicated by the fact that the Commission is not only prohibited from compelling respondents'

trict judge rendered a decision in No. 550 incorporating by reference the opinion of the three-judge District Court, and an injunction, identical in substance to that entered in No. 549, was issued.

I.

We held last Term in *Greene* v. *McElroy, supra,* that when action taken by an inferior governmental agency was accomplished by procedures which raise serious constitutional questions, an initial inquiry will be made to determine whether or not "the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use." *Id.,* at 507. The considerations which prompted us in *Greene* to analyze the question of authorization before reaching the constitutional issues presented are no less pertinent in this case. Obviously, if the Civil Rights Commission was not authorized to adopt the procedures complained of by the respondents, the case could be disposed of without a premature determination of serious constitutional questions. See *Vitarelli* v. *Seaton,* 359 U. S. 535; *Kent* v. *Dulles,* 357 U. S. 116; *Watkins* v. *United States,* 354 U. S. 178; *Peters* v. *Hobby,* 349 U. S. 331.

We therefore consider first the question of authorization. As indicated above, the Commission specifically refused to disclose to the respondents the identity of persons who had submitted sworn complaints to the Commission and the specific charges contained in those complaints. Moreover, the respondents were informed by the Commission that they would not be permitted to cross-examine

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appearance at the hearing, but it is also enjoined from conducting *any* hearing in the Western District of Louisiana under existing rules of procedure, whether or not the respondents are called as witnesses.

any witnesses at the hearing. The respondents contend, and the court below held, that Congress did not authorize the adoption of procedural rules which would deprive those being investigated by the Commission of the rights to apprisal, confrontation, and cross-examination. The court's holding is best summarized by the following language from its opinion:

> "[W]e find nothing in the Act which expressly authorizes or permits the Commission's refusal to inform persons, under investigation for criminal conduct, of the nature, cause and source of the accusations against them, and there is nothing in the Act authorizing the Commission to deprive these persons of the right of confrontation and cross-examination." 177 F. Supp., at 822.

After thoroughly analyzing the Rules of Procedure contained in the Civil Rights Act of 1957 and the legislative history which led to the adoption of that Act, we are of the opinion that the court below erred in its conclusion and that Congress did authorize the Commission to adopt the procedures here in question.

It could not be said that Congress ignored the procedures which the Commission was to follow in conducting its hearings. Section 102 of the Civil Rights Act of 1957 lists a number of procedural rights intended to safeguard witnesses from potential abuses. Briefly summarized, the relevant subdivisions of Section 102 provide that the Chairman shall make an opening statement as to the subject of the hearing; that a copy of the Commission's rules shall be made available to witnesses; that witnesses "may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights"; that potentially defamatory, degrading, or incriminating testimony shall be received in executive session, and

that any person defamed, degraded, or incriminated by such testimony shall have an opportunity to appear voluntarily as a witness and to request the Commission to subpoena additional witnesses; that testimony taken in executive session shall be released only upon the consent of the Commission; and that witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record.[12]

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[12] The complete text of Section 102 reads as follows:

"§ 1975a. *Rules of procedure.*

"(a) *Opening statement.*

"The Chairman or one designated by him to act as Chairman at a hearing of the Commission shall announce in an opening statement the subject of the hearing.

"(b) *Copy of rules.*

"A copy of the Commission's rules shall be made available to the witness before the Commission.

"(c) *Attendance of counsel.*

"Witnesses at the hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

"(d) *Censure and exclusion of counsel.*

"The Chairman or Acting Chairman may punish breaches of order and decorum and unprofessional ethics on the part of counsel, by censure and exclusion from the hearings.

"(e) *Defamatory, degrading or incriminating evidence.*

"If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpena additional witnesses.

"(f) *Requests for additional witnesses.*

"Except as provided in this section and section 1975d (f) of this title, the Chairman shall receive and the Commission shall dispose of requests to subpena additional witnesses.

[*Footnote 12 continued on pp. 433–434.*]

The absence of any reference to apprisal, confrontation, and cross-examination, in addition to the fact that counsel's role is specifically limited to advising witnesses of their constitutional rights, creates a presumption that Congress did not intend witnesses appearing before the Commission to have the rights claimed by respondents. This initial presumption is strengthened beyond any

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"(g) *Release of evidence taken in executive session.*

"No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the Commission. Whoever releases or uses in public without the consent of the Commission evidence or testimony taken in executive session shall be fined not more than $1,000, or imprisoned for not more than one year.

"(h) *Submission of written statements.*

"In the discretion of the Commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission is the sole judge of the pertinency of testimony and evidence adduced at its hearings.

"(i) *Transcripts.*

"Upon payment of the cost thereof, a witness may obtain a transcript copy of his testimony given at a public session or, if given at an executive session, when authorized by the Commission.

"(j) *Witness fees.*

"A witness attending any session of the Commission shall receive $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Witnesses who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $12 per day for expenses of subsistence, including the time necessarily occupied in going to and returning from the place of attendance. Mileage payments shall be tendered to the witness upon service of a subpena issued on behalf of the Commission or any subcommittee thereof.

"(k) *Restriction on issuance of subpena.*

"The Commission shall not issue any subpena for the attendance and testimony of witnesses or for the production of written or other

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reasonable doubt by an investigation of the legislative history of the Act.

The complete story of the 1957 Act begins with the 1956 House Civil Rights Bill, H. R. 627. That bill was reported out of the House Judiciary Committee without any reference to the procedures to be used by the Commission in conducting its hearings. H. R. Rep. No. 2187, 84th Cong., 2d Sess. During the floor debate, Representative Dies of Texas introduced extensive amendments designed to regulate the procedure of Commission hearings. 102 Cong. Rec. 13542. Those amendments would have guaranteed to witnesses appearing before the Commission all of the rights claimed by the respondents in these cases. The amendments provided, in pertinent part, that a person who might be adversely affected by the testimony of another "shall be fully advised by the

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matter which would require the presence of the party subpenaed at a hearing to be held outside of the State, wherein the witness is found or resides or transacts business." 71 Stat. 634, 42 U. S. C. § 1975a.

In addition to the procedural safeguards provided by Section 102 of the Act, the Commission's Rules of Procedure grant additional protection. Thus, Rule 3 (f) of the Commission's Rules of Procedure provides:

"(f) An accurate transcript shall be made of the testimony of all witnesses in all hearings, either public or executive sessions, of the Commission or of any subcommittee thereof. Each witness shall have the right to inspect the record of his own testimony. A transcript copy of his testimony may be purchased by a witness pursuant to Rule 2 (i) above. Transcript copies of public sessions may be obtained by the public upon payment of the cost thereof."

And Rule 3 (j) provides:

"(j) If the Commission pursuant to Rule 2 (e), or any subcommittee thereof, determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall advise such person that such evidence has been given and it shall afford such person an opportunity to read the pertinent testimony and to appear as a voluntary witness or to file a sworn statement in his behalf."

Commission as to the matters into which the Commission proposes to inquire and the adverse material which is proposed to be presented"; that a person adversely affected by evidence or testimony given at a public hearing could "appear and testify or file a sworn statement in his own behalf"; that such a person could also "have the adverse witness recalled" within a stated time; and that he or his counsel could cross-examine adverse witnesses.[13]

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[13] The amendments introduced by Representative Dies read, in pertinent part, as follows:

"'(q) A person shall be considered to be adversely affected by evidence or testimony of a witness if the Commission determines that: (i) the evidence or testimony would constitute libel or slander if not presented before the Commission or (ii) the evidence or testimony alleges crime or misconduct or tends to disgrace or otherwise to expose the person to public contempt, hatred, or scorn.

"'(r) Insofar as practicable, any person whose activities are the subject of investigation by the Commission, or about whom adverse information is proposed to be presented at a public hearing of the Commission, shall be fully advised by the Commission as to the matters into which the Commission proposes to inquire and the adverse material which is proposed to be presented. Insofar as practicable, all material reflecting adversely on the character or reputation of any individual which is proposed to be presented at a public hearing of the Commission shall be first reviewed in executive session to determine its reliability and probative value and shall not be presented at a public hearing except pursuant to majority vote of the Commission.

"'(s) If a person is adversely affected by evidence or testimony given in a public hearing, that person shall have the right: (i) to appear and testify or file a sworn statement in his own behalf, (ii) to have the adverse witness recalled upon application made within thirty days after introduction of such evidence or determination of the adverse witness' testimony, (iii) to be represented by counsel as heretofore provided, (iv) to cross-examine (in person or by counsel) such adverse witness, and (v) subject to the discretion of the Commission, to obtain the issuance by the Commission of subpenas for witnesses, documents, and other evidence in his defense. Such opportunity for rebuttal shall be afforded promptly and, so

The bill, as finally passed by the House, contained all of the amendments proposed by Representative Dies. 102 Cong. Rec. 13998–13999. However, before further action could be taken, the bill died in the Senate. Although many proposals relating to civil rights were introduced in the 1957 Session of Congress, two bills became the prominent contenders for support. One was S. 83, a bill introduced by Senator Dirksen containing the same procedural provisions that the amended House bill in 1956 had contained. The other bill, H. R. 6127, was introduced by Representative Celler, Chairman of the House Judiciary Committee, and this bill incorporated the so-called House "fair play" rules as the procedures which should govern the conduct of Commission hearings.[14] After extensive debate and hearings, H. R. 6127

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far as practicable, such hearing shall be conducted at the same place and under the same circumstances as the hearing at which adverse testimony was presented.

" 'Cross-examination shall be limited to one hour for each witness, unless the Commission by majority vote extends the time for each witness or group of witnesses.

" '(t) If a person is adversely affected by evidence or testimony given in executive session or by material in the Commission files or records, and if public release of such evidence, testimony, or material is contemplated such person shall have, prior to the public release of such evidence or testimony or material or any disclosure of or comment upon it by members of the Commission or Commission staff or taking of similar evidence or testimony in a public hearing, the rights heretofore conferred and the right to inspect at least as much of the evidence or testimony of the adverse witness or material as will be made public or the subject of a public hearing.

" '(u) Any witness (except a member of the press who testifies in his professional capacity) who gives testimony before the Commission in an open hearing which reflects adversely on the character or reputation of another person may be required by the Commission to disclose his sources of information, unless to do so would endanger the national security.' " 102 Cong. Rec. 13542–13543.

[14] The complete text of the House "fair play" rules may be found in H. Res. 151, 84th Cong., 1st Sess.

was finally passed by both Houses of Congress, and the House "fair play" rules, which make no provision for advance notice, confrontation, or cross-examination, were adopted in preference to the more protective rules suggested in S. 83.[15]

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[15] That Congress focused upon the issues here involved and recognized the distinctions between H. R. 6127 and S. 83 is attested to by the following extracts from the floor debate and committee hearings:

In testifying before both the House and Senate Subcommittees considering the various proposed civil rights bills, Attorney General Brownell supported the adoption of the House "fair play" rules instead of the more restrictive procedures outlined in S. 83. Thus, at the Senate hearings, the Attorney General made the following statement:

"Now there is one other addition to S. 83 that I would like to make special reference to and that is the provision for rules of procedure contained in section 102 on pages 2 to 10 of S. 83.

"These rules of procedure are considerably more restrictive than those imposed on regular committees of the House and Senate. There is much in them which clearly would be desirable. We have not as yet had any experience with the use of rules such as those proposed here and we cannot predict the extent to which they might be used to obstruct the work of the Commission.

. . . . .

"Yet I feel that the task to be given to this Commission is of such great public importance that it would be a mistake to make it the vehicle for experimenting with new rules which may have to be tested out under the courts and this is only a 2-year Commission and you might have to spend those 2 years studying the rules instead of getting at the facts." Hearings before Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 85th Cong., 1st Sess. 14–15.

See also Hearings before Subcommittee No. 5 of the House Judiciary Committee, 85th Cong., 1st Sess. 593.

The lack of any right to cross-examine witnesses was commented upon by members of both the House and the Senate:

Statement of Senator Talmadge during the Senate floor debate, 103 Cong. Rec. 11504:

"No provision is made for notification of persons against whom charges are to be made. [*Footnote 15 continued on pp. 438–439.*]

The legislative background of the Civil Rights Act not only provides evidence of congressional authorization, but it also distinguishes these cases from *Greene* v. *McElroy, supra,* upon which the court below relied so heavily. In *Greene* there was no express authorization by Congress or the President for the Department of Defense to adopt the type of security clearance program there involved. Nor was there any legislative history or executive directive indicating that the Secretary of Defense was authorized to establish a security clearance program which could deprive a person of his government employment on the basis of secret and undisclosed information. Therefore, we concluded in *Greene* that because of the serious constitutional problems presented, mere acquiescence by the President or the Congress would not be sufficient to constitute authoriza-

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"No provision is made for persons adversely affected by testimony taken by the Commission to be present when they are accused or later to confront and cross-examine their accusers."

Statement of Senator Stennis during Senate floor debate, 103 Cong. Rec. 13835:

"Defamatory testimony tending to defame, degrade, or incriminate any person cannot be heard by the person slandered, since the testimony must be taken in executive session. There is no requirement in the proposed statute that the person injured by defamatory testimony shall have an opportunity to examine the nature of the adverse testimony. He has no right of confrontation nor cross-examination, and his request to subpena witnesses on his behalf falls within the arbitrary discretion of the Commission. There is no right to subpena witnesses."

Statement of Representative Kilday during House floor debate, 103 Cong. Rec. 8673:

"The bill provides that witnesses may be accompanied by counsel, for what purpose? 'For the purpose of advising them concerning their constitutional rights.' That is all. Even though the Commission or its own counsel develops only a portion of a transaction, and that adverse to the witness, his lawyer cannot ask a single question to develop the remainder of the transaction or the portion favorable to him."

tion for the security clearance procedures adopted by the Secretary of Defense. The facts of this case present a sharp contrast to those before the Court in *Greene*. Here, we have substantially more than the mere acquiescence upon which the Government relied in *Greene*. There was a conscious, intentional selection by Congress of one bill, providing for none of the procedures demanded by respondents, over another bill, which provided for all of those procedures. We have no doubt that Congress' consideration and rejection of the procedures here at issue constituted an authorization to the Commission to conduct its hearings according to the Rules of Procedure it has adopted, and to deny to witnesses the rights of apprisal, confrontation, and cross-examination.

Statement of Representative Frazier during Hearings before the House Rules Committee, 85th Cong., 1st Sess. 176:

"The authors of this proposal contemplate that it will yield thousands of complaints and even more thousands of subpenas will be issued. The various allegations will, in the first instance, be incontrovertible and wholly ex parte and the principal concerned, against whom the charges are made, when summoned as a witness is given no opportunity to cross-examine. True, the person summoned as a witness may have counsel (sec. 102), but only for the purpose of advising him of his constitutional rights."

That the bill contained the House "fair play" rules is demonstrated by the following statement of Representative Celler, the author of the bill:

"*The rules of procedure of the Commission are the same as those which govern the committees of the House.* For example, the chairman is required to make an opening statement as to the subject of the hearing. Witnesses are furnished with a copy of the Commission's rules and may be accompanied by counsel. The chairman is authorized to punish breaches of order by censure and exclusion. Protection is furnished to witnesses when it appears that a person may be the subject of derogatory information by requiring such evidence to be received in executive session, and affording the person affected the right to appear and testify, and further to submit a request for subpena of additional witnesses." 103 Cong. Rec. 8491. (Emphasis supplied.)

II.

The existence of authorization inevitably requires us to determine whether the Commission's Rules of Procedure are consistent with the Due Process Clause of the Fifth Amendment.[16]

Since the requirements of due process frequently vary with the type of proceeding involved, *e. g.*, compare *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126, 152, with *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91, we think it is necessary at the outset to ascertain both the nature and function of this Commission. Section 104 of the Civil Rights Act of 1957 specifies the duties to be performed by the Commission. Those duties consist of (1) investigating written, sworn allegations that anyone has been discriminatorily deprived of his right to vote; (2) studying and collecting information "concerning legal developments constituting a denial of equal protection of the laws under the Constitution"; and (3) reporting to the President and Congress on its activities, findings, and recommendations.[17] As is appar-

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[16] Although the respondents contend that the procedures adopted by the Commission also violate their rights under the Sixth Amendment, their claim does not merit extensive discussion. That Amendment is specifically limited to "criminal prosecutions," and the proceedings of the Commission clearly do not fall within that category. See *United States* v. *Zucker*, 161 U. S. 475, 481.

[17] The full text of Section 104 of the Act reads as follows:

"§ 1975c. *Duties; reports; termination.*

"(a) The Commission shall—

"(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based;

"(2) study and collect information concerning legal developments

ent from this brief sketch of the statutory duties imposed upon the Commission, its function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

The specific constitutional question, therefore, is whether persons whose conduct is under investigation by a governmental agency of this nature are entitled, by virtue of the Due Process Clause, to know the specific charges that are being investigated, as well as the identity of the complainants,[18] and to have the right to cross-

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constituting a denial of equal protection of the laws under the Constitution; and

"(3) appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution.

"(b) The Commission shall submit interim reports to the President and to the Congress at such times as either the Commission or the President shall deem desirable, and shall submit to the President and to the Congress a final and comprehensive report of its activities, findings, and recommendations not later than two years from September 9, 1957.

"(c) Sixty days after the submission of its final report and recommendations the Commission shall cease to exist." 71 Stat. 635, 42 U. S. C. § 1975c.

[18] It should be noted that the respondents in these cases did have notice of the general nature of the inquiry. The only information withheld from them was the identity of specific complainants and the exact charges made by those complainants. Because most of the charges related to the denial of individual voting rights, it is apparent that the Commission could not have disclosed the exact charges without also revealing the names of the complainants.

examine those complainants and other witnesses. Although these procedures are very desirable in some situations, for the reasons which we shall now indicate, we are of the opinion that they are not constitutionally required in the proceedings of this Commission.

"Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. An analysis of these factors demonstrates why it is that the particular rights claimed by the respondents need not be conferred upon those appearing before purely investigative agencies, of which the Commission on Civil Rights is one.

It is probably sufficient merely to indicate that the rights claimed by respondents are normally associated only with adjudicatory proceedings, and that since the Commission does not adjudicate, it need not be bound by adjudicatory procedures. Yet, the respondents contend, and the court below implied, that such procedures

are required since the Commission's proceedings might irreparably harm those being investigated by subjecting them to public opprobrium and scorn, the distinct likelihood of losing their jobs, and the possibility of criminal prosecutions. That any of these consequences will result is purely conjectural. There is nothing in the record to indicate that such will be the case or that past Commission hearings have had any harmful effects upon witnesses appearing before the Commission. However, even if such collateral consequences were to flow from the Commission's investigations, they would not be the result of any affirmative determinations made by the Commission, and they would not affect the legitimacy of the Commission's investigative function.[19]

On the other hand, the investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings, and if persons who might be indirectly affected by an investigation were given an absolute right to cross-examine every witness called to testify. Fact-finding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable. Even a person not called as a witness could demand the right to appear at the hearing, cross-examine any witness whose testimony or sworn affidavit allegedly defamed or incriminated him, and call an unlimited number of witnesses of

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[19] Cf. *Sinclair* v. *United States*, 279 U. S. 263, 295, holding that Congress' legitimate right to investigate is not affected by the fact that information disclosed at the investigation may also be used in a subsequent criminal prosecution. Cf. also *McGrain* v. *Daugherty*, 273 U. S. 135, 179–180, holding that 'a regular congressional investigation is not rendered invalid merely because "it might possibly disclose crime or wrongdoing" on the part of witnesses summoned to appear at the investigation. *Id.*, at 180.

his own selection.[20] This type of proceeding would make a shambles of the investigation and stifle the agency in its gathering of facts.

In addition to these persuasive considerations, we think it is highly significant that the Commission's procedures are not historically foreign to other forms of investigation under our system. Far from being unique, the Rules of Procedure adopted by the Commission are similar to those which, as shown by the Appendix to this opinion,[21] have traditionally governed the proceedings of the vast majority of governmental investigating agencies.

A frequently used type of investigative agency is the legislative committee. The investigative function of such committees is as old as the Republic.[22] The volumes written about legislative investigations have proliferated almost as rapidly as the legislative committees themselves, and the courts have on more than one occasion been confronted with the legal problems presented by such committees.[23] The procedures adopted by legislative inves-

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[20] The injunction issued by the court below would certainly lead to this result since it prohibits the Commission from conducting *any* hearing under existing procedure, even though those being investigated are not summoned to testify.

[21] A compilation of the rules of procedure governing the investigative proceedings of a representative group of administrative and executive agencies, presidential commissions, and congressional committees is set out in the Appendix to this opinion, *post*, p. 454.

[22] The first full-fledged congressional investigating committee was established in 1792 to "inquire into the causes of the failure of the late expedition under Major General St. Clair." 3 Annals of Cong. 493 (1792). The development and use of legislative investigation by the colonial governments is discussed in Eberling, Congressional Investigations, 13–30. The English origin of legislative investigation in this country is discussed in Dimock, Congressional Investigating Committees, 46–56.

[23] See, *e. g.*, *Kilbourn* v. *Thompson*, 103 U. S. 168; *McGrain* v. *Daugherty*, 273 U. S. 135; *Sinclair* v. *United States*, 279 U. S. 263; *Christoffel* v. *United States*, 338 U. S. 84; *United States* v. *Bryan*,

tigating committees have varied over the course of years. Yet, the history of these committees clearly demonstrates that only infrequently have witnesses appearing before congressional committees been afforded the procedural rights normally associated with an adjudicative proceeding. In the vast majority of instances, congressional committees have not given witnesses detailed notice or an opportunity to confront, cross-examine and call other witnesses.[24]

The history of investigations conducted by the executive branch of the Government is also marked by a decided absence of those procedures here in issue.[25] The best example is provided by the administrative regulatory agencies. Although these agencies normally make determinations of a quasi-judicial nature, they also frequently conduct purely fact-finding investigations. When doing the former, they are governed by the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §§ 1001–1011, and the parties to the adjudication are accorded the traditional safeguards of a trial. However, when

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339 U. S. 323; *United States* v. *Fleischman*, 339 U. S. 349; *Watkins* v. *United States*, 354 U. S. 178; *Barenblatt* v. *United States*, 360 U. S. 109.

[24] See Appendix, *post*, pp. 478–485. See also Dimock, Congressional Investigating Committees, 153; Eberling, Congressional Investigations, 283, 390; McGeary, The Developments of Congressional Investigative Power, 80; Liacos, Rights of Witnesses Before Congressional Committees, 33 B. U. L. Rev. 337, 359–361; American Bar Association, Special Committee on Individual Rights as Affected by National Security, Appendix to Report on Congressional Investigations, 67–68.

The English practice is described in Clokie and Robinson, Royal Commissions of Inquiry; Finer, Congressional Investigations: The British System, 18 U. of Chi. L. Rev. 521; Keeton, Parliamentary Tribunals of Inquiry, in Vol. 12, Current Legal Problems 1959, 12.

[25] See Appendix, *post*, pp. 454–471. See also Gellhorn, Federal Administrative Proceedings, 108; Report of the Attorney General's Committee on Administrative Procedure and the various Monographs written by that Committee.

these agencies are conducting nonadjudicative, fact-finding investigations, rights such as apprisal, confrontation, and cross-examination generally do not obtain.

A typical agency is the Federal Trade Commission. Its rules draw a clear distinction between adjudicative proceedings and investigative proceedings. 16 CFR, 1958 Supp., § 1.34. Although the latter are frequently initiated by complaints from undisclosed informants, *id.*, §§ 1.11, 1.15, and although the Commission may use the information obtained during investigations to initiate adjudicative proceedings, *id.*, § 1.42, nevertheless, persons summoned to appear before investigative proceedings are entitled only to a general notice of "the purpose and scope of the investigation," *id.*, § 1.33, and while they may have the advice of counsel, "counsel may not, as a matter of right, otherwise participate in the investigation." *Id.*, § 1.40. The reason for these rules is obvious. The Federal Trade Commission could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial. We have found no authorities suggesting that the rules governing Federal Trade Commission investigations violate the Constitution, and this is understandable since any person investigated by the Federal Trade Commission will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding, just as any person investigated by the Civil Rights Commission will have all of these safeguards, should some type of adjudicative proceeding subsequently be instituted.

Another regulatory agency which distinguishes between adjudicative and investigative proceedings is the Securities and Exchange Commission. This Commission conducts numerous investigations, many of which are initiated by complaints from private parties. 17 CFR § 202.4. Although the Commission's Rules provide that parties to adjudicative proceedings shall be given detailed

notice of the matters to be determined, *id.*, 1959 Supp., § 201.3, and a right to cross-examine witnesses appearing at the hearing, *id.*, § 201.5, those provisions of the Rules are made specifically inapplicable to investigations, *id.*, § 201.20,[26] even though the Commission is required to

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[26] The Commission's practice with regard to investigations was described by the Attorney General's Committee on Administrative Procedure, Monograph, Securities Exchange Commission, 34–41. The following extract is pertinent here:

"*Where formal investigations are utilized as preliminaries to decisive proceedings, the person being investigated is normally not sent a notice, which, in any event, is not public.* The order for investigation, which includes the notice, is, however, exhibited to any person examined in the course of such investigation who so requests; since ordinarily the investigation will include the examination of the person suspected of violation, he will, thus, have actual notice of the investigation. Since a person may, on the other hand, be wholly unaware of the fact that he is being investigated until his friends who are interviewed so inform him, and since this may sometimes give rise to antagonism and a feeling that the Commission is besmirching him behind his back, no reason is apparent why, simply as a matter of good will, the Commission should not in ordinary cases send a copy of its order for investigation to the person under investigation.

. . . . .

"The Commission's Rules of Practice expressly provide that all such rules (governing notice, amendments, objections to evidence, briefs, and the like) are inapplicable to formal investigatory hearings in the absence of express provision to the contrary in the order and with the exception of rule II, which relates to appearance and practice by representatives before the Commission. The testimony given in such investigations is recorded . . . . *In the usual case, witnesses are granted the right to be accompanied by counsel, but the latter's role is limited simply to advising the witnesses in respect of their right against self-incrimination without claiming the benefits of the immunity clause of the pertinent statute* (a right of which the presiding officer is, in any event, instructed to apprise the witnesses) *and to making objections to questions which assertedly exceed the scope of the order of investigation.*" *Id.*, 37–38. (Emphasis supplied.) See also Loss, Securities Regulation (1951), 1152.

initiate civil or criminal proceedings if an investigation discloses violations of law.[27] Undoubtedly, the reason for this distinction is to prevent the sterilization of investigations by burdening them with trial-like procedures.

Another type of executive agency which frequently conducts investigations is the presidential commission. Although a survey of these commissions presents no definite pattern of practice, each commission has generally been permitted to adopt whatever rules of procedure seem appropriate to it,[28] and it is clear that many of the most famous presidential commissions have adopted rules similar to those governing the proceedings of the Civil Rights Commission.[29] For example, the Roberts Commission established in 1941 to ascertain the facts relating to the Japanese attack upon Pearl Harbor, and to determine whether the success of the attack resulted from any derelictions of duty on the part of American military personnel, did not permit any of the parties involved in the investigation to cross-examine other witnesses. In fact, many of the persons whose conduct was being investigated were not represented by counsel and were not present during the interrogation of other witnesses. Hearings before the Joint Committee on the Investigation of the Pearl Harbor Attack, 79th Cong., 1st Sess., pts. 22–25.

Having considered the procedures traditionally followed by executive and legislative investigating agencies, we think it would be profitable at this point to discuss the oldest and, perhaps, the best known of all investigative bodies, the grand jury. It has never been considered necessary to grant a witness summoned before the grand

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[27] Loss, Securities Regulation (1951), 1153. See also the statutes cited in the Appendix, *post*, p. 463.

[28] Marcy, Presidential Commissions, 97–101.

[29] See Appendix, *post*, pp. 472–479.

jury the right to refuse to testify merely because he did not have access to the identity and testimony of prior witnesses. Nor has it ever been considered essential that a person being investigated by the grand jury be permitted to come before that body and cross-examine witnesses who may have accused him of wrongdoing. Undoubtedly, the procedural rights claimed by the respondents have not been extended to grand jury hearings because of the disruptive influence their injection would have on the proceedings, and also because the grand jury merely investigates and reports. It does not try.

We think it is fairly clear from this survey of various phases of governmental investigation that witnesses appearing before investigating agencies, whether legislative, executive, or judicial, have generally not been accorded the rights of apprisal, confrontation, or cross-examination. Although we do not suggest that the grand jury and the congressional investigating committee are identical in all respects to the Civil Rights Commission,[30] we mention them, in addition to the executive agencies and commissions created by Congress, to show that the rules of this Commission are not alien to those which have historically governed the procedure of investigations conducted by agencies in the three major branches of our Government. The logic behind this historical practice was recognized and described by Mr. Justice Cardozo's landmark opinion in *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294. In that

[30] However, the courts have on more than one occasion likened investigative agencies of the executive branch of Government to a grand jury. See, *e. g.*, *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 216; *Consolidated Mines of Calif.* v. *Securities & Exchange Comm'n*, 97 F. 2d 704, 708 (C. A. 9th Cir.); *Woolley* v. *United States*, 97 F. 2d 258, 262 (C. A. 9th Cir.).

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case, the Court was concerned with the type of hearing that the Tariff Commission was required to hold when conducting its investigations. Specifically, the Court was asked to decide whether the Tariff Act of 1922, 42 Stat. 858, gave witnesses appearing before the Commission the right to examine confidential information in the Commission files and to cross-examine other witnesses testifying at Commission hearings. Although the Court did not phrase its holding in terms of due process, we think that the following language from Mr. Justice Cardozo's opinion is significant:

> "The Tariff Commission advises; these others ordain. There is indeed this common bond that all alike are instruments in a governmental process which according to the accepted classification is legislative, not judicial. . . . Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditionary forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified, or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights." 288 U. S., at 318.

And in referring to the traditional practice of investigating bodies, Mr. Justice Cardozo had this to say:

> "[W]ithin the meaning of this act the 'hearing' assured to one affected by a change of duty does not include a privilege to ransack the records of the Commission, and to subject its confidential agents to an examination as to all that they have learned. *There*

was no thought to revolutionize the practice of investigating bodies generally and of this one in particular." *Id.*, at 319. (Emphasis supplied.)

Thus, the purely investigative nature of the Commission's proceedings, the burden that the claimed rights would place upon those proceedings, and the traditional procedure of investigating agencies in general, leads us to conclude that the Commission's Rules of Procedure comport with the requirements of due process.[31]

Nor do the authorities cited by respondents support their position. They rely primarily upon *Morgan* v. *United States*, 304 U. S. 1; *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123; and *Greene* v. *McElroy*, *supra*. Those cases are all distinguishable in that the government agency involved in each was found by the Court to have made determinations in the nature of adjudications affecting legal rights. Thus, in *Morgan*, the action of the Secretary of Agriculture in fixing the maximum rates to be charged by market agencies at stockyards was challenged. In voiding the order of the Secretary for his failure to conduct a trial-like hearing, the Court referred to the adjudicatory nature of the proceeding:

> "Congress, in requiring a 'full hearing,' had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." 304 U. S., at 19.

[31] The Commission cites *In re Groban*, 352 U. S. 330, and *Anonymous* v. *Baker*, 360 U. S. 287, in support of its position. Each of us who participated in those cases adheres to the view to which he subscribed therein. However, because there are significant differences between the *Groban* and *Anonymous* cases and the instant litigation, and because the result we reach today is supported by the other considerations analyzed herein, the Court does not find it necessary to discuss either of those cases.

Likewise, in *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, 140–141, this Court held that the Attorney General's action constituted an adjudication. Finally, our decision last year in *Greene* v. *McElroy* lends little support to the respondents' position. The governmental action there reviewed was certainly of a judicial nature. The various Security Clearance Boards involved in *Greene* were not conducting an investigation; they were determining whether Greene could have a security clearance—a license in a real sense, and one that had a significant impact upon his employment. By contrast, the Civil Rights Commission does not make any binding orders or issue "clearances" or licenses having legal effect. Rather, it investigates and reports leaving affirmative action, if there is to be any, to other governmental agencies where there must be action *de novo.*

The respondents have also contended that the Civil Rights Act of 1957 is inappropriate legislation under the Fifteenth Amendment. We have considered this argument, and we find it to be without merit. It would unduly lengthen this opinion to add anything to the District Court's disposition of this claim. See 177 F. Supp., at 819–821.

Respondents' final argument is that the Commission's hearings should be governed by Section 7 of the Administrative Procedure Act, 60 Stat. 241, 5 U. S. C. § 1006, which specifies the hearing procedures to be used by agencies falling within the coverage of the Act. One of those procedures is the right of every party to conduct "such cross-examination as may be required for a full and true disclosure of the facts." However, what the respondents fail to recognize is that Section 7, by its terms, applies only to proceedings under Section 4, 60 Stat. 238, 5 U. S. C. § 1003 (rule making), and Section 5, 60 Stat.

239, 5 U. S. C. § 1004 (adjudications), of the Act. As we have already indicated, the Civil Rights Commission performs none of the functions specified in those sections.

From what we have said, it is obvious that the District Court erred in both cases in enjoining the Commission from holding its Shreveport hearing. The court's judgments are accordingly reversed, and the cases are remanded with direction to vacate the injunctions.

Reversed and remanded.

[For opinion of Mr. Justice Frankfurter, concurring in the result, see *post*, p. 486.]

[For concurring opinion of Mr. Justice Harlan, joined by Mr. Justice Clark, see *post*, p. 493.]

[For dissenting opinion of Mr. Justice Douglas, joined by Mr. Justice Black, see *post*, p. 493.]

APPENDIX TO OPINION

[Footnotes at end of table]

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Executive and Administrative Agencies [2] Atomic Energy Commission.	The Commission is authorized to "make such studies and investigations, . . . and hold such meetings or hearings as . . . [it] may deem necessary or proper to assist it in exercising" any of its statutory functions. 68 Stat. 948, 42 U.S.C. § 2201 (c).	The Commission may subpoena any person to appear and testify or produce documents "at any designated place." 68 Stat. 948, 42 U. S. C. § 2201 (c).

OF THE COURT [1]

[Footnotes at end of table]

The type of notice required to be given in investigative proceedings [2]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [3]	Miscellaneous comments
This is not specified by statute. The Commission's Rules of Practice provide that "[t]he procedure to be followed in informal hearings shall be such as will best serve the purpose of the hearing." 10 CFR § 2.720. The Rules of Practice do not require any specific type of notice to be given in informal hearings. *Ibid.*	This is not specified by statute. The Commission's Rules of Practice do not require that those summoned to appear before informal hearings be given the right to cross-examine other witnesses. Rather, the Commission is given the discretion to adopt those procedures which "will best serve the purpose of the hearing." 10 CFR § 2.720.	The Commission's Rules of Practice draw a sharp distinction between informal and formal hearings. Formal hearings are used only in "cases of adjudication," 10 CFR § 2.708, and parties to the hearings are given detailed notice of the subject of the hearing, *id.*, § 2.735, as well as the right to cross-examine witnesses, *id.*, § 2.747. Informal hearings are used in investigations "for the purposes of obtaining necessary or useful information, and affording participation by interested persons, in the formulation, amendment, or rescission of rules and regulations." *Id.*, § 2.708. The safeguards which are accorded in the formal, adjudicative hearings are not mentioned in the Commission's Rule relating to informal hearings. *Id.*, § 2.720.

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Federal Communications Commission.	(1) The Commission is authorized to investigate any matters contained in a complaint "in such manner and by such means as it shall deem proper." 48 Stat. 1073, 47 U. S. C. § 208. (2) The Federal Communications Commission was also authorized to conduct a special investigation of the American Telephone and Telegraph Company, and to obtain information concerning the company's history and structure, the services rendered by it, its failure to reduce rates, the effect of monopolistic control on the company, the methods of competition engaged in by the company, and the company's attempts to influence public opinion by the use of propaganda. 49 Stat. 43.	(1) The Commission may "subpena the attendance and testimony of witnesses and the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation." 48 Stat. 1096, 47 U. S. C. § 409 (e). (2) The Commission was also given the subpoena power by the statute authorizing the investigation of the American Telephone and Telegraph Company. 49 Stat. 45.
Federal Trade Commission.	(1) The Commission is authorized to investigate "the organization, business, conduct, practices, and management of any corporation engaged in commerce"; to make an investigation of the manner in which antitrust decrees are being carried out; to investigate and report the facts relating to any alleged violations of the anti-	(1) The Commission may "subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." 38

The type of notice required to be given in investigative proceedings[3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings[4]	Miscellaneous comments
This is not specified by statute. The Commission's Rules of Practice do not specify the type of notice to be given in investigative proceedings. However, the Rules do provide that the "[p]rocedures to be followed by the Commission shall, unless specifically prescribed . . . [in the Rules], be such as in the opinion of the Commission will best serve the purposes of . . . [any investigative] proceeding." 47 CFR § 1.10.	This is not specified by statute. Nor do the Commission's Rules of Practice refer to cross-examination in investigative proceedings. Therefore, whether persons appearing at an investigation have the privilege of cross-examining witnesses apparently depends upon whether the Commission is of the opinion that cross-examination "will best serve the purposes of such proceeding." 47 CFR § 1.10. It should also be noted that even in that portion of the Commission's Rules relating to adjudicative proceedings, there is no specific provision relating to cross-examination. *Id.*, §§ 1.101–1.193.	It should be noted that the Commission's Report on the Telephone Investigation made no mention of the type of notice, if any, given to those summoned to appear at the investigation. Nor was there any reference to cross-examination. The Commission did permit the Company "to submit statements in writing pointing out any inaccuracies in factual data or statistics in the reports introduced in the hearings or in any testimony in connection therewith, provided that such statements were confined to the presentation of facts and that no attempt would be made therein to draw conclusions therefrom." H. R. Doc. No. 340, 76th Cong., 1st Sess. xviii.
(1) This is not specified by statute. The Commission's Rules of Practice provide that "[a]ny party under investigation compelled to furnish information or documentary evidence shall be advised with respect to	(1) This is not specified by statute. The Commission's Rules of Practice provide that a person required to testify in an investigative proceeding "may be accompanied and advised by counsel, but	(1) It is interesting to note that the Commission's Rules of Practice draw an express and sharp distinction between investigative and adjudicative proceedings, and that the Commission's Rules relating to notice and

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Federal Trade Commission—Continued.	trust Acts by any corporation; and "to investigate . . . trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States." 38 Stat. 721–722, 15 U.S.C. § 46. (2) The Commission was also authorized to conduct a special investigation of the motor vehicle industry to determine (a) "the extent of concentration of control and of monopoly in the manufacturing, warehousing, distribution, and sale of automobiles, accessories, and parts, including methods and devices used by manufacturers for obtaining and maintaining their control or monopoly . . . and the extent, if any, to which fraudulent, dishonest, unfair, and injurious methods . . . [were] employed, including combinations, monopolies, price fixing, or unfair trade practices"; and (b) "the extent to which any of the antitrust laws of the United States . . . [were] being violated." 52 Stat. 218.	Stat. 722, 15 U.S.C. § 49. (2) The Commission was also given the subpoena power under the statute authorizing the investigation of the motor vehicle industry. 52 Stat. 218.

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
the purpose and scope of the investigation." 16 CFR, 1959 Supp., § 1.33. (2) The Commission's Report on the Motor Vehicle Industry did not indicate what type of notice, if any, was given to those summoned to testify at the investigation. H.R. Doc. No. 468, 76th Cong., 1st Sess. Presumably, the Commission's regular Rules of Practice obtained.	counsel may not, as a matter of right, otherwise participate in the investigation." 16 CFR, 1959 Supp., § 1.40. Moreover, while the Rules of Practice make no mention of the right to cross-examine witnesses in investigative proceedings, see *id.*, § 1.31–1.42, such a right is specifically given to parties in an adjudicative proceeding. *Id.*, § 3.16. (2) The Commission's Report on the Motor Vehicle Industry did not refer to cross-examination. H.R. Doc. No. 468, 76th Cong., 1st Sess. Presumably, the Commission's regular Rules of Practice obtained.	cross-examination in investigative proceedings are very similar to those adopted by the Civil Rights Commission. (2) It should also be observed that FTC investigations may be initiated "upon complaint by members of the consuming public, businessmen, or the concerns aggrieved by unfair practices," 16 CFR, 1959 Supp., § 1.11, and that complaints received by the Commission may charge "any violation of law over which the Commission has jurisdiction." *Id.*, § 1.12. (3) Also relevant to our inquiry is the fact that the Commission does not "publish or divulge the name of an applicant or complaining party." *Id.*, § 1.15. (4) Finally, it is important to observe that the FTC, unlike the Civil Rights Commission, has the authority to commence adjudicative proceedings based upon the material obtained by means of investigative proceedings. *Id.*, § 1.42.

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
National Labor Relations Board.	Under the National Labor Relations Act, the Board is given the power to investigate petitions and charges submitted to it relating to union representation and unfair labor practices. 61 Stat. 144, 149, 29 U.S.C. §§ 159 (c), 160 (l).	"For the purpose of all hearings and investigations . . . the Board [may] . . . copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation," and it may also issue subpoenas requiring the attendance and testimony of witnesses in any proceeding or investigation. 61 Stat. 150, 29 U. S. C. § 161.
Securities and Exchange Commission.	(1) Under the Securities Act of 1933, as amended, the Commission is authorized to conduct "all investigations which . . . are necessary and proper for the enforcement of" the Act. 48 Stat. 85, 15 U. S. C. § 77s (b). (2) The Securities Exchange Act of 1934 authorizes the Commission to "make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provisions of . . . [the Act] or any rule or regulation thereunder." 48 Stat. 899, 15 U. S. C. § 78u (a). (3) The Public Utility Holding Company Act of 1935 empowers the Commission to "investigate any facts, condi-	All of the Acts which authorize the Commission to conduct investigations also bestow upon it the power to subpoena witnesses, compel their attendance, and require the production of any books, correspondence, memoranda, contracts, agreements, and other records which are relevant to the investigation. Securities Act of 1933, 48 Stat. 85, 15 U. S. C. § 77s (b); Securi-

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
This is not specified by statute. The Board's Statements of Procedure and Rules and Regulations provide for the preliminary investigation of all petitions and charges received by the Board. Although a copy of the initial charge may be served upon an alleged violator, there is no specific rule requiring the Board to give notice of the preliminary investigation. See 29 CFR, 1960 Supp., §§101.4, 101.18, 101.22, 101.27, 101.32, 102.63, 102.77, 102.85.	This is not specified by statute. The Board's Statements of Procedure and Rules and Regulations provide for the right to cross-examine witnesses at formal, adjudicative hearings, 29 CFR, 1960 Supp., §§101.10, 102.38, 102.66, 102.86, 102.90, but there is no such provision with regard to preliminary investigations. *Id.*, §§101.4, 101.18, 101.22, 101.27, 101.32, 102.63, 102.77, 102.85.	It should be noted that the National Labor Relations Board may use the information collected during preliminary investigations to initiate adjudicative proceedings. 61 Stat. 149, 29 U. S. C. § 160 (l). The Commission on Civil Rights has no such power. Moreover, the Board, unlike the Civil Rights Commission, may use the information obtained by it through investigations to petition the federal courts for appropriate injunctive relief, 61 Stat. 149, 29 U. S. C. § 160 (l).
This is not specified by statute. Nor do the Commission's Rules of Practice relating to formal investigations make any mention of the type of notice which must be given in such proceedings. 17 CFR § 202.4. The Commission's Rules do provide for the giving of notice in adjudicative proceedings, *id.*, 1959 Supp., § 201.3, but this provision is made specifically inapplicable to investigative proceedings. *Id.*, § 201.20.	This is not specified by statute. The Commission's Rules of Practice make no mention of the right to cross-examine witnesses in investigative proceedings. 17 CFR § 202.4. Parties are given the right to cross-examine witnesses in adjudicative proceedings, *id.*, § 201.5, but this provision is made specifically inapplicable to investigative proceedings. *Id.*, § 201.20.	The Securities and Exchange Commission's procedures for investigative proceedings are very similar to those of the Civil Rights Commission. Investigations may be initiated upon complaints received from members of the public, and these complaints may contain specific charges of illegal conduct. 17 CFR § 202.4. It should be noted, however, that the Securities and Exchange Commission, unlike the Civil

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Securities and Exchange Commission—Con.	tions, practices, or matters which it may deem necessary or appropriate to determine whether any person has violated or is about to violate any provision of . . . [the Act] or any rule or regulation thereunder, or to aid in the enforcement of the provisions of . . . [the Act], in the prescribing of rules and regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which . . . [the Act] relates." 49 Stat. 831, 15 U. S. C. § 79r (a). (4) The Trust Indenture Act of 1939 authorizes the Commission to conduct "any investigation . . . which . . . is necessary and proper for the enforcement of" the Act. 53 Stat. 1174, 15 U. S. C. § 77uuu (a). (5) The Investment Company Act of 1940 gives the Commission the power to "make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of . . . [the Act] or of any rule, regulation, or order thereunder, or to determine whether any action in any court or any proceeding before the Commission shall be instituted under . . . [the Act] against a particular person or persons, or with respect to a particular person or persons, or with respect to a particular transaction or transactions." 54 Stat. 842, 15 U. S. C. § 80a-41 (a). (6) Finally, under the Investment Advisers Act of 1940, the Commission is authorized to determine by investigation	ties Exchange Act of 1934, 48 Stat. 900, 15 U. S. C. § 78u (b); Public Utility Holding Company Act of 1935, 49 Stat. 831, 15 U. S. C. § 79r (c); Trust Indenture Act of 1939, 53 Stat. 1174, 15 U. S. C. § 77uuu (a); Investment Company Act of 1940, 54 Stat. 842, 15 U. S. C. § 80a-41 (b); Investment Advisers Act of 1940, 54 Stat. 853, 15 U. S. C. § 80b-9 (b).

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
		Rights Commission, is an adjudicatory body, and it may use the information gathered through investigative proceedings to initiate "administrative proceedings looking to the imposition of remedial sanctions, . . . (or) injunction proceedings in the courts, and, in the case of a willful violation," it may refer the "matter to the Department of Justice for criminal prosecution." *Ibid.* See also Securities Act of 1933, 48 Stat. 86, 15 U. S. C. § 77t (b); Securities Exchange Act of 1934, 48 Stat. 900, 15 U. S. C. § 78u (e); Public Utility Holding Company Act of 1935, 49 Stat. 832, 15 U. S. C. § 79r (f); Investment Company Act of 1940, 54 Stat. 843, 15 U. S. C. § 80a–41 (e); Investment Advisers Act of 1940, 54 Stat. 854, 15 U. S. C. § 80b–9 (e).

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Securities and Exchange Commission—Con.	whether "the provisions of . . . [the Act] or of any rule or regulation prescribed under the authority thereof, have been or are about to be violated by any person." 54 Stat. 853, 15 U. S. C. § 80b-9 (a).	
Office of Price Stabilization.[5]	The Defense Production Act of 1950 authorized the President "to issue regulations and orders establishing a ceiling or ceilings on the price, rental, commission, margin, rate, fee, charge, or allowance paid or received on the sale or delivery, or the purchase or receipt, by or to any person, of any material or service, and at the same time . . . issue regulations and orders stabilizing wages, salaries, and other compensation in accordance with provisions of" the Act. 64 Stat. 803. This authority was delegated to the Economic Stabilization Administrator by Exec. Order No. 10161, 15 Fed. Reg. 6105. The Administrator in turn delegated the duty of issuing price regulations to the Office of Price Stabilization. Gen. Order No. 2 of the Economic Stabilization Agency, 16 Fed. Reg. 738. Pursuant to this authority, the Office of Price Stabilization promulgated Rules of Procedure, Section 2 of which provided that investigations would be held before the issuance of a ceiling price regulation. Price Procedural Regulation 1, Revision 2—General Price Procedures, § 2, 17 Fed. Reg. 3788.	The Defense Production Act of 1950 conferred upon the President the power, "by subpena or otherwise, to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, and take the sworn testimony of, any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of . . . [the] Act and the regulations or orders issued thereunder." 64 Stat. 816. This power was delegated to the Office of Price Stabilization by Exec. Order No. 10161, 15 Fed. Reg. 6105; Gen. Order No. 2 of the Economic Stabilization Agency, 16 Fed. Reg. 738.

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
This was not specified by statute or Executive Order. The Office's Rules of Procedure provided that a general public notice was to be given in the Federal Register of all pre-issuance hearings. Price Procedural Regulation 1—General Price Procedures, § 4, 17 Fed. Reg. 3788.	This was not specified by statute or Executive Order. Nor did the Office's Rules of Procedure make any mention of the right to cross-examine witnesses appearing at pre-issuance hearings. The Rules merely said that the hearing was to "be conducted in such manner, consistent with the need for expeditious action, as will permit the fullest possible presentation of the evidence by such persons as are, in the judgment of the Director, best qualified to provide information with respect to matters considered at the hearing or most likely to be seriously affected by action which may be taken as a result of the hearing." Price Procedural Regulation 1—General Price Procedures, § 5, 17 Fed. Reg. 3788.	It should be noticed that the Office's pre-issuance hearings usually led to determinations which had severe effects upon certain individuals; yet, there was no provision for personalized, detailed notice or cross-examination.

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Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Office of Price Administration.[6]	The Administrator was "authorized to make such studies and investigations and to obtain such information as he . . . [deemed] necessary or proper to assist him in prescribing any regulation or order under . . . [the] Act, or in the administration and enforcement of . . . [the] Act and regulations, orders, and price schedules thereunder." 56 Stat. 30.	"For the purpose of obtaining any information [in an investigation] . . . the Administrator . . . [could] by subpena require any . . . person to appear and testify or to appear and produce documents, or both, at any designated place." 56 Stat. 30.
The Department of Agriculture.	(1) Under the Perishable Agricultural Commodities Act of 1930, the Department is authorized to investigate any complaint filed with the Secretary alleging that someone has violated the Act. 46 Stat. 534, 7 U. S. C. § 499f(c). (2) The Department also enforces the Packers and Stock-	(1) The Perishable Agricultural Commodities Act of 1930 authorizes the Secretary to "require by subpoena the attendance and testimony of witnesses and the produc-

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
This was not specified by statute. The Administrator's Rules of Procedure did not specify the type of notice, if any, to be given during the investigative stage of price regulation proceedings. 32 CFR, 1944 Supp., § 1300.2. After the investigation, the Administrator could hold a price hearing prior to issuance of the regulation, and general notice of the hearing was to be published in the Federal Register. *Id.*, § 1300.4.	This was not specified by statute. The Administrator's Rules of Procedure made no mention of the right to cross-examine witnesses during either investigations or pre-issuance hearings. 32 CFR, 1944 Supp., §§ 1300.2, 1300.5. The Rules merely provided that hearings were to be conducted "in such manner, consistent with the need for expeditious action, as will permit the fullest possible presentation of evidence by such persons as are, in the judgment of the Administrator, best qualified to provide information with respect to matters considered at the hearing or most likely to be seriously affected by action which may be taken as a result of the hearing." *Id.*, § 1300.5.	It should be noted that even though the Administrator's proceedings smacked of an adjudication, there was no express requirement that either detailed notice or the right to cross-examine witnesses be given to parties affected by the Administrator's actions.
This is not specified by statute. The Department's Rules of Practice adopted pursuant to the Perishable Agricultural Commodities Act and the Packers and Stockyards Act do not refer to the type	This is not specified by statute. The Department's Rules of Practice adopted pursuant to the Perishable Agricultural Commodities Act and the Packers and Stockyards Act contain no reference to	(1) The Department of Agriculture, unlike the Civil Rights Commission, may use the information obtained through investigations in its subsequent adjudicative proceedings under the Perishable Agricultural

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
The Department of Agriculture—Con.	yards Act of 1921, which, for the purposes of that Act, gives the Secretary the investigative and other enforcement powers possessed by the Federal Trade Commission, 42 Stat 168, 7 U. S. C. § 222. The Department's Rules of Practice also provide that investigations shall be conducted when informal complaints charging a violation of the Act are received by the Secretary. 9 CFR § 202.23.	tion of such accounts, records, and memoranda as may be material for the determination of any complaint under" the Act. 46 Stat. 536, 7 U. S. C. § 499m (b). (2) The Packers and Stockyards Act of 1921 gives to the Secretary those powers conferred upon the Federal Trade Commission by "sections 46 and 48–50 of Title 15." Among those powers is the authority to subpoena witnesses. 42 Stat. 168, 7 U. S. C. § 222.

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
of notice, if any, which must be given in investigative proceedings, 7 CFR § 47.3; 9 CFR § 202.3, although a specific right to notice is given in adjudicative proceedings. 7 CFR §§ 47.6, 47.27; 9 CFR §§ 202.6, 202.23, 202.39.	cross-examination during investigative proceedings, 7 CFR § 47.3; 9 CFR § 202.3, although such a right is given in the formal, adjudicative stage of the proceedings. 7 CFR §§ 47.15, 47.32; 9 CFR §§ 202.11, 202.29, 202.48.	Commodities Act. 7 CFR § 47.7. (2) It is also of interest that investigative proceedings under both the Perishable Agricultural Commodities Act and the Packers and Stockyards Act are commenced by the filing of complaints from private individuals. 7 CFR § 47.3; 9 CFR § 202.3. (3) Finally, it should be noted that the Department of Agriculture administers the Federal Seed Act, 53 Stat. 1275, 7 U. S. C. §§ 1551–1610, which makes it unlawful to engage in certain practices relating to the labeling and importation of seeds, and a statute regulating export standards for apples and pears, 48 Stat. 123, 7 U. S. C. §§ 581–589. The Rules of Practice adopted by the Secretary pursuant to statutory authorization provide that proceedings under these statutes shall be initiated by an investigation of the charges contained in any complaint received by the Secretary. These Rules make no mention of the type of notice, if any, given to those being investigated;

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
The Department of Agriculture—Con.		
Commodity Exchange Commission (Department of Agriculture).	The Commodity Exchange Act empowers the Secretary of Agriculture (acting through the Commission) to "make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade, whether prior or subsequent to the enactment of" the Act. The Secretary is also empowered to "investigate marketing conditions of commodity and commodity products and byproducts, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges." 42 Stat. 1003, as amended, 49 Stat. 1491, 7 U.S.C. § 12.	The Secretary of Agriculture (acting through the Commission) is given the same subpoena powers as are vested in the Interstate Commerce Commission by the Interstate Commerce Act, 24 Stat. 383, 27 Stat. 443, 32 Stat. 904, 34 Stat. 798, 49 U.S.C. §§ 12, 46–48. 42 Stat. 1002, as amended, 49 Stat. 1499, 69 Stat. 160, 7 U.S.C. § 15.
Food and Drug Administration (Department of Health, Education and Welfare).	The Regulations adopted pursuant to the Federal Caustic Poison Act, 44 Stat. 1406, 15 U.S.C. §§ 401–411, authorize the Administration to conduct investigations, 21 CFR § 285.15, and to hold preliminary hearings "whenever it appears . . . that the provisions of section 3 or 6 of the Caustic Poison Act . . . have been violated and criminal proceedings are contemplated." *Id.*, § 285.17.	The Act makes no provision for compelling testimony.

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
		nor is there any reference to cross-examination during the investigative stage of the proceedings. 7 CFR §§ 201.151, 33.17.
This is not specified by statute. The Commission has no special rules for investigations; however, its Rules of Practice provide that a private party may initiate a disciplinary proceeding by filing a complaint, and that an investigation of the complaint will be made. No mention is made of the type of notice, if any, which must be given in investigative proceedings. 17 CFR § 0.53.	This is not specified by statute. The Commission has no special rules for investigations; however, its Rules of Practice provide that a private party may initiate a disciplinary proceeding by filing a complaint, and that an investigation of the complaint will be made. No mention is made of the right to cross-examine witnesses during investigative proceedings. 17 CFR § 0.53.	It is of interest to note that investigations may be initiated by complaints from private parties, and that the information obtained during investigations may be used in a subsequent adjudicative proceeding. 17 CFR § 0.53.
This is not specified by statute. The Administration's Regulations make no reference to notice of investigative proceedings, but they do require that general notice be given to those against whom prosecution is contemplated. 21 CFR § 285.17.	This is not specified by statute. The Administration's regulations make no mention of the right to cross-examine witnesses appearing at investigative proceedings or preliminary hearings. 21 CFR § 285.17.	It should be noted that the Administration investigates specific instances of possible unlawful activity, and that, unlike the Civil Rights Commission, the Secretary (acting through the Administration) is required to refer possible violations to the proper United States Attorney. 44 Stat. 1409, 15 U. S. C. § 409 (b).

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Presidential Commissions United States Tariff Commission.	(1) The Commission is authorized "to investigate the administration and fiscal and industrial effects of the customs laws of this country now in force or which may be hereafter enacted, the relations between the rates of duty on raw materials and finished products, the effects of ad valorem and specific duties and of compound specific and ad valorem duties, all questions relative to the arrangement of schedules and classification of articles in the several schedules of the customs law, and, in general, . . . the operation of customs laws, including their relation to the Federal revenues, [and] their effect upon the industries and labor of the country." 46 Stat. 698, 19 U. S. C. § 1332 (a). (2) The Commission is also authorized "to investigate the tariff relations between the United States and foreign countries, commercial treaties, preferential provisions, economic alliances, the effect of export bounties and preferential transportation rates, the volume of importations compared with domestic production and consumption, and conditions, causes and effects relating to competition of foreign industries with those of the United States, including dumping and cost of production." 46 Stat. 698, 19 U. S. C. § 1332 (b). (3) The Commission may investigate "the Paris Economy Pact and similar organizations and arrangements in Europe." 46 Stat. 698, 19 U. S. C. § 1332 (c). (4) The Commission is empowered to "investigate the difference in the costs of pro-	The Commission may, "for the purposes of carrying out its functions and duties in connection with any investigation authorized by law, . . . (1) . . . have access to and the right to copy any document, paper, or record, pertinent to the subject matter under investigation, in the possession of any person, firm, copartnership, corporation, or association engaged in the production, importation, or distribution of any article under investigation, (2) . . . summon witnesses, take testimony, and administer oaths, (3) . . . require any firm, person, copartnership, corporation, or association to produce books or papers relating to any matter pertaining to such investigation, and (4) . . . require any person, firm, copartnership, corporation, or association, to furnish in writing, in such detail and in such form as the commission may prescribe, information in their possession pertain-

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
Many of the statutory provisions authorizing the Commission to hold hearings pursuant to its investigatory power require that reasonable notice of prospective hearings be given. 46 Stat. 701, 19 U. S. C. § 1336 (a); 65 Stat. 72, 19 U. S. C. § 1360 (b)(1); 65 Stat. 74, 19 U. S. C. § 1364 (a); 49 Stat. 774, 7 U. S. C. § 624 (a). The Commission's Rules of Practice also provide that public notice of any pending investigation shall be given. 19 CFR, 1960 Supp., § 201.10.	This is not specified by statute. The Commission's Rules permit a party who has entered an appearance to question a witness "for the purpose of assisting the Commission in obtaining the material facts with respect to the subject matter of the investigation." 19 CFR § 201.14. However, all questioning is done under the direction of and subject to the limitations imposed by the Commission, and a person who has not entered a formal appearance may not, as a matter of right, question witnesses. *Ibid.* See also *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294.	(1) Since the Commission's investigative powers are generally exercised to aid the President in the execution of his duties under the Tariff Act, it is readily apparent that the Commission's investigations may have far reaching effects upon those persons affected by specific tariff regulations. (2) It should also be noted that business data given to the Commission may be classified as confidential, 19 CFR § 201.6, and that confidential material contained in applications for investigation and complaints will not be made available for public inspection. *Id.*, § 201.8.

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
United States Tariff Commission—Con.	duction of any domestic article and of any like or similar foreign article." 46 Stat. 701, 19 U. S. C. § 1336 (a). (5) The Commission is authorized to investigate any complaint alleging that a person has engaged in unfair methods of competition or unfair acts in the importation of articles into the United States. 46 Stat. 703, 19 U. S. C. § 1337 (a), (b). (6) Before the President enters into negotiations concerning any proposed foreign trade agreement, the Commission is required to conduct an investigation and make a report to the President, indicating the type of agreement which will best carry out the purpose of the Tariff Act. 65 Stat. 72, 19 U. S. C. § 1360 (a). (7) The Commission is authorized to "make an investigation and make a report thereon . . . to determine whether any product upon which a concession has been granted under a trade agreement is, as a result, in whole or in part, of the duty or other customs treatment reflecting such concession, being imported into the United States in such increased quantities, either actual or relative, as to cause or threaten serious injury to the domestic industry producing like or directly competitive products." 65 Stat. 74, 19 U. S. C. § 1364(a). (8) The Commission is authorized to investigate the effects of dumping, and to determine whether because of such dumping, "an industry in the United States is being or is likely to be injured, or is prevented from being established." 42 Stat. 11, 19 U. S. C. § 160(a).	ing to such investigation." 46 Stat. 699, as amended, 72 Stat. 679, 19 U. S. C. § 1333 (a).

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
United States Tariff Commission—Con.	(9) Finally, the Commission is authorized to conduct investigations for the purpose of determining whether "any article or articles are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, any program or operation undertaken under" the Agricultural Adjustment Act or the Soil Conservation and Domestic Allotment Act. 49 Stat. 773, as amended, 62 Stat. 1248, 7 U. S. C. § 624 (a).	
Commission To Investigate the Japanese Attack on Hawaii.	The Commission was authorized to investigate the attack upon Pearl Harbor in order "to provide bases for sound decisions whether any derelictions of duty or errors of judgment on the part of the United States Army or Navy personnel contributed to such successes as were achieved by the enemy on the occasion mentioned, and if so, what these derelictions or errors were, and who were responsible therefor." Exec. Order No. 8983, 6 Fed. Reg. 6569.	The Commission was authorized "to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation by the Commission." 55 Stat. 854.

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
Neither the Executive Order creating the Commission, Exec. Order No. 8983, 6 Fed. Reg. 6569, nor the joint resolution conferring the subpoena power upon the Commission, 55 Stat. 853, required the Commission to inform prospective witnesses of complaints lodged against them.	Neither the Executive Order creating the Commission, Exec. Order No. 8983, 6 Fed. Reg. 6569, nor the joint resolution conferring the subpoena power upon the Commission, 55 Stat. 853, made any mention of the right to cross-examine witnesses. An examination of the Commission's proceedings does not disclose instances wherein any witness or party to the investigation was given the right to cross-examine other witnesses. In fact, such interested parties as Admiral Kimmel and General Short, the Navy and Army commanders at Pearl Harbor, were not even present at the hearings when other	It is of special interest that the Commission was charged with the responsibility of determining whether the successful attack upon Pearl Harbor resulted from any individual derelictions of duty. Yet, even though the Commission's investigation had all the earmarks of an adjudication, none of the procedural safeguards demanded by the respondents in these cases were provided.

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Commission To Investigate the Japanese Attack on Hawaii—Continued.		
Temporary National Economic Committee.	The Committee was authorized to investigate "monopoly and the concentration of economic power in and financial control over production and distribution of goods and services . . . with a view to determining . . . (1) the causes of such concentration and control and their effect upon competition; (2) the effect of the existing price system and the price policies of industry upon the general level of trade, upon employment, upon long-term profits, and upon consumption, and (3) the effect of existing tax, patent, and other Government policies upon competition, price levels, unemployment, profits, and consumption." 52 Stat. 705.	The Committee was given the same subpoena powers as were conferred upon the Securities and Exchange Commission by the Public Utility Holding Company Act, 49 Stat. 831, 15 U. S. C. § 79r(c). 52 Stat. 706.
Congressional Investigating Committees[7] Senate Committee of Privileges (1800).	The Committee was authorized to conduct an investigation into charges that William Duane, a newspaper editor, had published articles defaming the Senate. 10 Annals of Cong. 117 (1800).	The Committee was authorized "to send for persons, papers, and records, and compel the attendance of witnesses which may become requisite for the execution of their commission." 10 Annals of Cong. 121 (1800).

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
	witnesses were testifying. Hearings of the Joint Congressional Committee on the Investigation of the Pearl Harbor Attack, 79th Cong., 1st Sess., pts. 22–25.	
This was not specified by statute. The Rules of Procedure adopted by the Committee for the conduct of its hearings made no mention of the type of notice, if any, which was to be given to prospective witnesses. Hearings of the Temporary National Economic Committee, pt. 1. 193.	This was not specified by statute. The Rules of Procedure adopted by the Committee for the conduct of its hearings did not refer to cross-examination. There was merely a general statement that "[i]n all examination of witnesses, the rules of evidence shall be observed but liberally construed." Hearings of the Temporary National Economic Committee, pt. 1, 193.	
This was not specified by the authorizing resolution. However, a subsequent resolution provided that Duane was to be informed of the charges against him when he presented himself at the bar of the Senate. 10 Annals of Cong. 117 (1800).	This was not specified by the authorizing resolution. The Senate later rejected a motion to permit Duane "to have assistance of counsel for his defense," but allowed him to be heard through counsel "in denial of any facts charged against [him] or in excuse and extenuation of his offence." 10 Annals of Cong. 118, 119 (1800).	It should be noted that this Committee was investigating the allegedly unlawful conduct of a specific individual; yet, it does not appear that he was given the right to cross-examine adverse witnesses.

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Committee of the Senate to Investigate Whether Senator John Smith of Ohio Should Retain His Seat in the Senate (1807).	Senator Smith had been accused of conspiring with Aaron Burr to commit treason, and the Committee was established to investigate the charges and to inquire whether Senator Smith "should be permitted any longer to have a seat" in the Senate. 17 Annals of Cong. 40 (1807).	The authorizing resolution did not indicate whether the Committee had the subpoena power. 17 Annals of Cong. 40 (1807).
Joint Committee on the Conduct of the Civil War (1861).	(1) The Committee was established "to inquire into the conduct of the present [Civil] war." Cong. Globe, 37th Cong., 2d Sess. 32, 40 (1861). (2) The Committee was also authorized "to inquire into the truth of the rumored slaughter of the Union troops, after their surrender, at the recent attack of the rebel forces upon Fort Pillow, Tennessee; as, [*sic*] also, whether Fort Pillow could have been sufficiently reenforced or evacuated, and, if so, why it was not done." 13 Stat. 405.	The Committee had "the power to send for persons and papers." Cong. Globe, 37th Cong., 2d Sess. 32, 40 (1861).

The type of notice required to be given in investigative proceedings [1]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
This was not specified by the authorizing resolution. The Committee furnished Senator Smith with a description of the charges and evidence against him. Report of the Committee, 17 Annals of Cong. 56 (1807).	This was not specified by the authorizing resolution. Before the Committee, Senator Smith "claimed, as a right, to be heard in his defense by counsel, to have compulsory process for witnesses, and to be confronted with his accusers, as if the Committee had been a circuit court of the United States." Report of the Committee, 17 Annals of Cong. 56 (1807). However, the Committee rejected these claims on the ground that it was not a court, but rather a body whose function it was to investigate and report the facts relating to Senator Smith's conduct. *Ibid.*	Here again, it should be observed that the Committee was investigating the conduct of a particular individual, and that the Committee's findings could have had severe consequences on that individual.
This was not specified by the authorizing resolution. Many of the generals whose conduct was being investigated were given no notice of the charges that had been leveled against them. Botterud, The Joint Committee on the Conduct of the Civil War (M.A. Thesis, Georgetown University, 1949), 42.	This was not specified by the authorizing resolution. Many of the generals whose conduct was being investigated were not given the right to be assisted by counsel or to cross-examine other witnesses. Botterud, The Joint Committee on the Conduct of the Civil War (M.A. Thesis, Georgetown University, 1949), 42.	It should be noted that the Committee's investigation frequently centered on the allegedly derelict conduct of specific individuals. Botterud, The Joint Committee on the Conduct of the Civil War (M.A. Thesis, Georgetown University, 1949), 42.

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Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
House Committee to Investigate the Electric Boat Company of New Jersey (1908).	The Committee was established to investigate charges that the Electric Boat Company of New Jersey had "been engaged in efforts to exert corrupting influence on certain Members of Congress in their legislative capacities, and . . . [had], in fact, exerted such corrupting influence." H. R. Res. 288, 60th Cong., 1st Sess., 42 Cong. Rec. 2972.	The Committee had authority "to send for persons and papers." H. R. Res. 288, 60th Cong., 1st Sess., 42 Cong. Rec. 2972.
House Committee to Investigate Violations of the Antitrust Laws by the American Sugar Refining Co. (1911).	(1) The Committee was authorized to conduct an investigation "for the purpose of ascertaining whether or not there have been violations of the antitrust act of July 2, 1890, and the various acts supplementary thereto, by the American Sugar Refining Co.," and further, to "investigate the organization and operations of said American Sugar Refining Co., and its relations with other persons or corporations engaged in the business of manufacturing or refining sugar, and all other persons or corporations engaged in manufacturing or refining sugar and their relations with each other." H. R. Res., 157, 62d Cong., 1st Sess., 47 Cong. Rec. 1143.	The Committee was authorized "to compel the attendance of witnesses, [and] to send for persons and papers." H. R. Res. 157, 62d Cong., 1st Sess., 47 Cong. Rec. 1143.
Senate Committee to Investigate Lobbying (1935–1936).	The Committee was authorized "to make a full and complete investigation of all lobbying activities and all efforts to influence, encourage, promote, or retard legislation, directly or indirectly, in connection with the so-called 'holding-company bill',	The Committee was authorized "to require by subpena or otherwise the attendance of such witnesses and the production of such

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
This was not specified by the authorizing resolution. However, most of the charges which led to the investigation were made in public hearings before the Rules Committee of the House. H.R. Rep. No. 1168, 60th Cong., 1st Sess.	The questioning of all witnesses was conducted by the Committee, although the parties being investigated were permitted to submit written interrogatories for the Committee to propound to certain witnesses. H. R. Rep. No. 1727, 60th Cong., 1st Sess. 11.	It is of interest that the Committee was investigating specific charges of corruption leveled against named individuals.
This was not specified by the authorizing resolution. Nor was this specified by the Committee's Rules of Procedure.	This was not specified by the authorizing statute. The Committee's Rules of Procedure provided that "counsel may attend witnesses summoned before this committee, but may not participate in the proceedings, either by way of examination or argument, except upon permission given by the committee, from time to time, as the occasion arises." Hearings before the Special Committee on the Investigation of the American Sugar Refining Co., 62d Cong., 1st Sess., Vol. 1, 3.	Once again, it should be noted that the Committee was established to investigate, among other things, possible violations of the law.
This was not specified by the authorizing resolution.	This was not specified by the authorizing resolution. The Committee adopted a rule that witnesses and their attorneys could not examine other wit-	

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Senate Committee to Investigate Lobbying (1935–1936)—Con.	or any other matter or proposal affecting legislation." S. Res. 165, 74th Cong., 1st Sess., 79 Cong. Rec. 11003.	correspondence, books, papers, and documents . . . as it . . . [deemed] advisable." S. Res. 165, 74th Cong., 1st Sess., 79 Cong. Rec. 11003.

[1] This Appendix describes the Rules of Procedure governing the authorized investigative proceedings of a representative group of administrative agencies, executive departments, presidential commissions, and congressional committees. The Appendix does not purport to be a complete enumeration of the hundreds of agencies which have conducted investigations during the course of this country's history. Rather, it is designed to demonstrate that the procedures adopted by the Civil Rights Commission are similar to those which have traditionally been used by investigating agencies in both the executive and legislative branches of our Government.

[2] We have found many other administrative agencies and presidential commissions empowered to conduct investigations and to subpoena witnesses. Those agencies are not listed in the body of this Appendix because we were unable to find an adequate description of the rules of procedure governing their investigative proceedings. However, it is significant that the statutes creating these agencies made no reference to apprisal or cross-examination in investigative proceedings. Among the agencies in this category are: (1) Bureau of Corporations in the Department of Commerce and Labor, 32 Stat. 827; (2) Commission on Industrial Relations, 37 Stat. 415; (3) the Railroad Labor Board, 41 Stat. 469; (4) the United States Coal Commission, 42 Stat. 1023; (5) the Investigation Commission established by the Railroad Retirement Act of 1935, 49 Stat. 972; (6) National Bituminous Coal Commission, 49 Stat. 992; (7) Wage and Hour Division of the Department of Labor, 52 Stat. 1061; (8) Board of Investigation to Investigate Various Modes of Transportation, 54 Stat. 952; (9) Commission on Organization of the Executive Branch of the Government, 67 Stat. 143; (10) Commission on Intergovernmental Relations, 67 Stat. 145.

[3] If the relevant statute makes no reference to notice, this fact will be mentioned. The negative inference which may be drawn from the absence of any statutory requirement that notice be given is supported by the fact that, in a few instances, Congress has made specific provision for the giving of notice in investigative proceedings. See, *e.g.*, the statutes cited on p. 473, *supra*, requiring the United States Tariff Commission to give reasonable notice of any investigative hearing.

[4] If the relevant statute makes no reference to cross-examination, that fact will be mentioned because of the inference which may be drawn therefrom that Congress did not intend persons appearing at investigative hearings to cross-examine other witnesses. This inference

The type of notice required to be given in investigative proceedings [5]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [6]	Miscellaneous comments
	nesses; however, they could submit written questions, which the Committee would consider propounding to other witnesses. Hearings before Special Senate Committee to Investigate Lobbying Activities, 74th Cong., 2d Sess. 1469.	

is strengthened by the fact that in a relatively few instances Congress has, for one reason or another, required that persons being investigated by a commission or agency be given the right to cross-examine other witnesses. See, *e.g.*, 49 Stat. 1381, which authorized the Secretary of Commerce to appoint special boards to investigate the causes of marine casualties.

[5] The Office of Price Stabilization is now defunct, having been terminated by Exec. Order No. 10434, 18 Fed. Reg. 809.

[6] The Office of Price Administration is now defunct, its functions having been transferred to the Office of Temporary Controls by Exec. Order No. 9809, 11 Fed. Reg. 14281, which in turn was terminated by Exec. Order No. 9841, 12 Fed. Reg. 2645.

[7] In addition to the investigating committees listed in the body of the Appendix, we think mention should also be made of the contemporary standing committees of Congress. Most of these committees have rules very similar to those adopted by the Civil Rights Commission. The Rules of Procedure of the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration are typical. Rule 17 of the Rules reads as follows:

"There shall be no direct or cross examination by counsel appearing for a witness. However, the counsel may submit in writing any question or questions he wishes propounded to his client or to any other witness. With the consent of the majority of the Members of the Subcommittee present and voting, such question or questions shall be put to the witness by the Chairman, by a Member of the Subcommittee or by the Counsel of the Subcommittee either in the original form or in modified language. The decision of the Subcommittee as to the admissibility of questions submitted by counsel for a witness, as well as to their form, shall be final."

See also S. Rep. No. 2, 84th Cong., 1st Sess. 20; Hearings before the Subcommittee on Rules of the Senate Committee on Rules and Administration, on S. Res. 65, 146, 223, 249, 253, 256, S. Con. Res. 11, and 86, 83d Cong., 2d Sess., Part 3, 141–142, 344, 345, 374; Rules of Procedure of the Select Committee on Improper Activities in the Labor or Management Field, Rules 10 and 11. Reference has been made in the text, *supra*, pp. 436–439, to the House "fair play" rules, which govern the hearings of most House Committees, and which make no provision for cross-examination.

MR. JUSTICE FRANKFURTER, concurring in the result.

The United States Commission on Civil Rights, in exercising powers granted to it by the Civil Rights Act of 1957 (71 Stat. 635, 42 U. S. C. § 1975c), scheduled a hearing to be held by it in Shreveport, Louisiana, on July 13, 1959. By these two actions judgments were sought to declare the proposed hearing illegal and to restrain the members of the Commission from holding it.

The rules of procedure formulated by the Commission amply rest on leave of Congress. I need add nothing on this phase of the case to the Court's opinion. While it is a most salutary doctrine of constitutional adjudication to give a statute even a strained construction to avoid facing a serious doubt of constitutionality, "avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered." *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 379. I have no such misgivings in the situation before us. I also agree with the Court's conclusion in rejecting the constitutional claims of the plaintiffs. In view, however, of divergencies between the Court's analysis and mine of the specific issues before us, including the authoritative relevance of *In re Groban,* 352 U. S. 330, and *Anonymous No. 6* v. *Baker,* 360 U. S. 287, I state my reasons for agreement.

To conduct the Shreveport hearing on the basis of sworn allegations of wrongdoing by the plaintiffs, without submitting to them these allegations and disclosing the identities of the affiants, would, it is claimed, violate the Constitution. The issue thus raised turns exclusively on the application of the Due Process Clause of the Fifth Amendment. The Commission's hearings are not proceedings requiring a person to answer for an "infamous crime," which must be based on an indictment of a grand

jury (Amendment V), nor are they "criminal prosecutions" giving an accused the rights defined by Amendment VI. Since due process is the constitutional axis on which decision must turn, our concern is not with absolutes, either of governmental power or of safeguards protecting individuals. Inquiry must be directed to the validity of the adjustment between these clashing interests—that of Government and of the individual, respectively—in the procedural scheme devised by the Congress and the Commission. Whether the scheme satisfies those strivings for justice which due process guarantees, must be judged in the light of reason drawn from the considerations of fairness that reflect our traditions of legal and political thought, duly related to the public interest Congress sought to meet by this legislation as against the hazards or hardship to the individual that the Commission procedure would entail.

Barring rare lapses, this Court has not unduly confined those who have the responsibility of governing within a doctrinaire conception of "due process." The Court has been mindful of the manifold variety and perplexity of the tasks which the Constitution has vested in the legislative and executive branches of the Government by recognizing that what is unfair in one situation may be fair in another. Compare, for instance, *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, with *Ng Fung Ho* v. *White*, 259 U. S. 276, and see *Communications Comm'n* v. *WJR*, 337 U. S. 265, 275. Whether the procedure now questioned offends "the rudiments of fair play," *Chicago, M. & St. P. R. Co.* v. *Polt*, 232 U. S. 165, 168, is not to be tested by loose generalities or sentiments abstractly appealing. The precise nature of the interest alleged to be adversely affected or of the freedom of action claimed to be curtailed, the manner in which this is to be done and the reasons for doing it, the balance of individual hurt and the justifying public good—these and such like are the

considerations, avowed or implicit, that determine the judicial judgment when appeal is made to "due process."

The proposed Shreveport hearing creates risks of harm to the plaintiffs. It is likewise true that, were the plaintiffs afforded the procedural rights they seek, they would have a greater opportunity to reduce these risks than will be theirs under the questioned rules of the Commission. Some charges touching the plaintiffs might be withdrawn or modified, if those making them knew that their identities and the content of their charges were to be revealed. By the safeguards they seek the plaintiffs might use the hearing as a forum for subjecting the charges against them to a scrutiny that might disprove them or, at least, establish that they are not incompatible with innocent conduct.

Were the Commission exercising an accusatory function, were its duty to find that named individuals were responsible for wrongful deprivation of voting rights and to advertise such finding or to serve as part of the process of criminal prosecution, the rigorous protections relevant to criminal prosecutions might well be the controlling starting point for assessing the protection which the Commission's procedure provides. The objectives of the Commission on Civil Rights, the purpose of its creation, and its true functioning are quite otherwise. It is not charged with official judgment on individuals nor are its inquiries so directed. The purpose of its investigations is to develop facts upon which legislation may be based. As such, its investigations are directed to those concerns that are the normal impulse to legislation and the basis for it. To impose upon the Commission's investigations the safeguards appropriate to inquiries into individual blameworthiness would be to divert and frustrate its purpose. Its investigation would be turned into a forum for the litigation of individual culpability—matters which are not within the keeping

of the Commission, with which it is not effectively equipped to deal, and which would deflect it from the purpose for which it was within its limited life established.

We would be shutting our eyes to actualities to be unmindful of the fact that it would dissuade sources of vitally relevant information from making that information known to the Commission, if the Commission were required to reveal its sources and subject them to cross-examination. This would not be a valid consideration for secrecy were the Commission charged with passing official incriminatory or even defamatory judgment on individuals. Since the Commission is merely an investigatorial arm of Congress, the narrow risk of unintended harm to the individual is outweighed by the legislative justification for permitting the Commission to be the critic and protector of the information given it. It would be wrong not to assume that the Commission will responsibly scrutinize the reliability of sworn allegations that are to serve as the basis for further investigation and that it will be rigorously vigilant to protect the fair name of those brought into question.

In appraising the constitutionally permissive investigative procedure claimed to subject individuals to incrimination or defamation without adequate opportunity for defense, a relevant distinction is between those proceedings which are preliminaries to official judgments on individuals and those, like the investigation of this Commission, charged with responsibility to gather information as a solid foundation for legislative action. Judgments by the Commission condemning or stigmatizing individuals are not called for. When official pronouncements on individuals purport to rest on evidence and investigation, it is right to demand that those so accused be given a full opportunity for their defense in such investigation, excepting, of course, grand jury investigations. The functions of that institution and its constitutional prerog-

atives are rooted in long centuries of Anglo-American history. On the other hand, to require the introduction of adversary contests relevant to determination of individual guilt into what is in effect a legislative investigation is bound to thwart it by turning it into a serious digression from its purpose.

The cases in which this Court has recently considered claims to procedural rights in investigative inquiries alleged to deal unfairly with the reputation of individuals or to incriminate them, have made clear that the fairness of their procedures is to be judged in light of the purpose of the inquiry, and, more particularly, whether its essential objective is official judgment on individuals under scrutiny. Such a case was *Greene* v. *McElroy*, 360 U. S. 474. There the inquiry was for the purpose of determining whether the security clearance of a particular person was to be revoked. A denial of clearance would shut him off from the opportunity of access to a wide field of employment. The Court concluded that serious constitutional questions were raised by denial of the rights to confront accusatory witnesses and to have access to unfavorable reports on the basis of which the very livelihood of an individual would be gravely jeopardized. Again, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, presented a contrasting situation to the one before us. The Government there sought through the Attorney General to designate organizations as "Communist," thus furnishing grounds on which to discharge their members from government employment. No notice was given of the charges against the organizations nor were they given an opportunity to establish the innocence of their aims and acts. It was well within the realities to say of what was under scrutiny in *Joint Anti-Fascist Refugee Committee* v. *McGrath* that "It would be blindness . . . not to recognize that in the conditions of our time such designation drastically restricts

the organizations, if it does not proscribe them." 341 U. S., at 161 (concurring opinion). And the procedure which was found constitutionally wanting in that case could be fairly characterized as action "to maim or decapitate, on the mere say-so of the Attorney General, an organization to all outward-seeming engaged in lawful objectives . . . ." *Ibid.* Nothing like such characterization can remotely be made regarding the procedure for the proposed inquiry of the Commission on Civil Rights.

Contrariwise, decisions arising under the Due Process Clause of the Fourteenth Amendment strongly support the constitutionality of what is here challenged, where the purposes were as here truly investigatorial. Thus, *In re Groban*, 352 U. S. 330, sustained inquiry by the Ohio State Fire Marshal into the causes of a fire while excluding counsel of subpoenaed witnesses on whose premises the fire occurred. The Court so held even though the Fire Marshal had authority, after questioning a witness, to arrest him if he believed there was sufficient evidence to charge him with arson. The guiding consideration was that, although suspects might be discovered, the essential purpose of the Fire Marshal's inquiry was not to adjudicate individual responsibility for the fire but to pursue a legislative policy of fire prevention through the discovery of the origins of fires. This decision was applied in *Anonymous No. 6* v. *Baker*, 360 U. S. 287, which concerned "a state judicial Inquiry into alleged improper practices at the local bar" (at p. 288). Rejecting the claim based on the consideration that the inquiry might serve as a groundwork for the prosecution of witnesses called before it, the Court applied *Groban* because the inquiry was a general one and appellants were before it not as potential accused but "solely as witnesses." The proposed investigation of the Commission on Civil Rights is much less likely to result in prosecution of witnesses before it than were the investigations in *Groban* and

Baker. Just as surely, there is not present in the cases now before us a drastic official judgment, as in *Greene* and *Joint Anti-Fascist Refugee Committee*, where the Court deemed it necessary to insure that full opportunity for defense be accorded to individuals who were the specific, adverse targets of the secret process.

Moreover, the limited, investigatorial scope of the challenged hearing is carefully hedged in with protections for the plaintiffs. They will have the right to be accompanied by counsel. The rules insure that they will be made aware of the subject of the hearings. They will have the right to appeal to the Commission's power to subpoena additional witnesses. The rules significantly direct the Commission to abstain from public exposure by taking in executive session any evidence or testimony tending "to defame, degrade, or incriminate any person." A person so affected is given the right to read such evidence and to reply to it. These detailed provisions are obviously designed as safeguards against injury to persons who appear in public hearings before the Commission. The provision for screening defamatory and incriminatory testimony in order to keep it from the public may well be contrasted with the procedure in the *Joint Anti-Fascist* case, where the very purpose of the inquiry was to make an official judgment that certain organizations were "Communist." Such condemnation of an organization would of course taint its members. The rules of the Commission manifest a sense of its responsibility in carrying out the limited investigatorial task confided to it. It is not a constitutional requirement that the Commission be argumentatively turned into a forum for trial of the truth of particular allegations of denial of voting rights in order thereby to invalidate its functioning. Such an inadmissible transformation of the Commission's function is in essence what is involved in the claims of the plaintiffs. Congress has entrusted the Commission with a very dif-

ferent role—that of investigating and appraising general conditions and reporting them to Congress so as to inform the legislative judgment. Resort to a legislative commission as a vehicle for proposing well-founded legislation and recommending its passage to Congress has ample precedent.

Finally it should be noted that arguments directed either at the assumed novelty of employing the Commission in the area of legislative interest which led Congress to its establishment, or at the fact that the source of the Commission's procedures were those long used by Committees of Congress, are not particularly relevant. History may satisfy constitutionality, but constitutionality need not produce the title deeds of history. Mere age may establish due process, but due process does not preclude new ends of government or new means for achieving them. Since the Commission has, within its legislative framework, provided procedural safeguards appropriate to its proper function, claims of unfairness offending due process fall. The proposed Shreveport hearing fully comports with the Constitution and the law. Accordingly I join the judgment of the Court in reversing the District Court.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, concurring.

In joining the Court's opinion, as I do, I desire to add that in my view the principles established by *In re Groban*, 352 U. S. 330, and *Anonymous* v. *Baker*, 360 U. S. 287, are dispositive of the issues herein in the Commission's favor.

MR JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

With great deference to my Brethren I dissent from a reversal of these judgments.

The cause which the majority opinion serves is, on the surface, one which a person dedicated to constitutional

principles could not question. At the bottom of this controversy is the right to vote protected by the Fifteenth Amendment. That Amendment withholds power from either the States or the United States to deny or abridge the right to vote "on account of race, color, or previous condition of servitude." This right stands beyond the reach of government. Only voting qualifications that conform to the standards proscribed by the Fifteenth Amendment may be prescribed. See *Lassiter* v. *Northampton Election Board*, 360 U. S. 45. As stated in *Terry* v. *Adams*, 345 U. S. 461, 468, "The Amendment, the congressional enactment and the cases make explicit the rule against racial discrimination in the conduct of elections." By democratic values this right is fundamental, for the very existence of government dedicated to the concept "of the people, by the people, for the people," to use Lincoln's words, depends on the franchise.

Yet important as these civil rights are, it will not do to sacrifice other civil rights in order to protect them. We live and work under a Constitution. The temptation of many men of goodwill is to cut corners, take short cuts, and reach the desired end regardless of the means. Worthy as I think the ends are which the Civil Rights Commission advances in these cases, I think the particular means used are unconstitutional.

The Commission, created by Congress, is a part of "the executive branch" of the Government, 71 Stat. 634, 42 U. S. C. § 1975 (a), whose members are appointed by the President and confirmed by the Senate. § 1975 (a). It is given broad powers of investigation with the view of making a report with "findings and recommendations" to the Congress. § 1975c. It is empowered, among other things, to

> "investigate allegations in writing under oath or affirmation that certain citizens of the United States

> are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based." § 1975c (a)(1).

Complaints have been filed with the Commission charging respondents, who are registrars of voters in Louisiana, with depriving persons of their voting rights by reason of their color. If these charges are true and if the registrars acted willfully (see *Screws* v. *United States*, 325 U. S. 91), the registrars are criminally responsible under a federal statute which subjects to fine and imprisonment [1] anyone who willfully deprives a citizen of any right under the Constitution "by reason of his color, or race." [2] 18 U. S. C. § 242.

The investigation and hearing by the Commission are therefore necessarily aimed at determining if this criminal law has been violated. The serious and incriminating nature of the charge and the disclosure of facts concerning it are recognized by the Congress, for the Act requires certain protective procedures to be adopted where defamatory, degrading, or incriminating evidence may be adduced.

> "If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford

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[1] Civil suits for damages are also authorized. See 42 U. S. C. § 1983; *Lane* v. *Wilson*, 307 U. S. 268.

[2] The section reads in relevant part as follows:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . by reason of his color, or race . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both."

such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpena additional witnesses." 42 U. S. C. § 1975a (e).

Yet these safeguards, given as a matter of grace, do not in my judgment dispose of the constitutional difficulty. First, it is the Commission's judgment, not the suspect's, that determines whether the hearing shall be secret or public. Thus this procedure has one of the evils protested against in *In re Groban*, 352 U. S. 330, 337, 348–353 (dissenting opinion). The secrecy of the inquisition only underlines its inherent vices: "Secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power. They are often the beginning of tyranny as well as indispensable instruments for its survival. Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the state and whisked away for secret interrogation or worse until the groundwork has been securely laid for their inevitable conviction." *Id.*, at 352–353. As said in dissent in *Anonymous* v. *Baker*, 360 U. S. 287, 299, "secretly compelled testimony does not lose its highly dangerous potentialities merely because" it is taken in preliminary proceedings. Second, the procedure seems to me patently unconstitutional whether the hearing is public or secret. Under the Commission's rules the accused is deprived of the right to notice of the charges against him and the opportunity of cross-examination. This statutory provision, fashioned to protect witnesses as such rather than a prospective defendant, permits the Commission to exclude the accused entirely from the hearing and deny him the opportunity even to observe the testimony of his accusers. And even if the Commission were inclined in a particular case to protect the accused from the opprobrium likely to flow from the testimony of

individual witnesses against him by holding secret sessions, this would be little comfort after the Commission's findings, based on such untested evidence, were publicized across the Nation.

I assume that no court would be justified in enjoining a Congressional Committee composed of Senators or Congressmen that engaged in this kind of conduct. This is not that kind of a committee. Moreover, even if it were and if private rights were infringed by reason of the Committee's violations of the Constitution, there are circumstances when redress can be had in the courts. *Kilbourn* v. *Thompson,* 103 U. S. 168. Cf. *Greenfield* v. *Russel,* 292 Ill. 392, 127 N. E. 102; *Opinion of the Justices,* 96 N. H. 530, 73 A. 2d 433. The judiciary also becomes implicated when the Congress asks the courts to back up what its Committees have done; or when a victim of an investigation asks relief from punishment imposed on him. Then the procedural safeguards of the Bill of Rights come into full play. See *Watkins* v. *United States,* 354 U. S. 178.

The Civil Rights Commission, however, is not a Congressional Committee of Senators or Congressmen; nor is it an arm of Congress. It is an arm of the Executive. There is, in my view, only one way the Chief Executive may move against a person accused of a crime and deny him the right of confrontation and cross-examination and that is by the grand jury.

The grand jury is the accusatory body in federal law as provided by the Fifth Amendment. The essence of the institution of the grand jury was stated by 1 Stephen, History of Criminal Law of England, 252: "The body of the country are the accusers." Thomas Erskine stated the matter accurately and eloquently in *Jones* v. *Shipley,* 21 How. St. Tr. 847, 977.

> "[I]t is unnecessary to remind your lordships, that, in a civil case, the party who conceives himself

aggrieved, states his complaint to the court,—avails himself at his own pleasure of its process,—compels an answer from the defendant by its authority,—or taking the charge *pro confesso* against him on his default, is entitled to final judgment and execution for his debt, without any interposition of a jury. But in criminal cases it is otherwise; the court has no cognizance of them, without leave from the people forming a grand inquest. If a man were to commit a capital offence in the face of all the judges of England, their united authority could not put him upon his trial:—they could file no complaint against him, even upon the records of the supreme criminal court, but could only commit him for safe custody, which is equally competent to every common justice of the peace:—the grand jury alone could arraign him, and in their discretion might likewise finally discharge him, by throwing out the bill, with the names of all your lordships as witnesses on the back of it. If it shall be said, that this exclusive power of the grand jury does not extend to lesser misdemeanors, which may be prosecuted by information; I answer, that for that very reason it becomes doubly necessary to preserve the power of the other jury which is left."

This idea, though uttered in 1783, is modern and relevant here. The grand jury brings suspects before neighbors, not strangers. Just recently in *Stirone* v. *United States,* 361 U. S. 212, 218, we said, "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."

This Commission has no such guarantee of fairness. Its members are not drawn from the neighborhood. The

members cannot be as independent as grand juries because they meet not for one occasion only; they do a continuing job for the executive and, if history is a guide, tend to acquire a vested interest in that role.

The grand jury, adopted as a safeguard against "hasty, malicious, and oppressive" action by the Federal Government, *Ex parte Bain,* 121 U. S. 1, 12, stands as an important safeguard to the citizen against open and public accusations of crime. Today the grand jury may act on its own volition, though originally specific charges by private prosecutors were the basis of its action. *Hale* v. *Henkel,* 201 U. S. 43, 59–60. It has broad investigational powers to look into what may be offensive against federal criminal law. *United States* v. *Johnson,* 319 U. S. 503, 510. An indictment returned by a grand jury may not be challenged because it rests wholly on hearsay. *Costello* v. *United States,* 350 U. S. 359, 361–362. An accused is not entitled to a hearing before a grand jury, nor to present evidence, nor to be represented by counsel; and a grand jury may act secretly—a procedure normally abhorrent to due process. In this country as in England of old, the grand jury is convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor. *Costello* v. *United States, supra,* at 362.

Grand juries have their defects. They do not always return a true bill, for while the prejudices of the community may radiate through them, they also have the saving quality of being familiar with the people involved. They are the only accusatory body in the Federal Government that is recognized by the Constitution. I would allow no other engine of government, either executive or legislative, to take their place—at least when the right of confrontation and cross-examination are denied the accused as is done in these cases.

The might and power of the Federal Government have no equal. When its guns are leveled at a citizen on charges that he committed a federal crime, it is for me no answer to say that the only purpose is to report his activities to the President and Congress, not to turn him over to the District Attorney for prosecution. Our Constitution was drawn on the theory that there are certain things government may not do to the citizen and that there are other things that may be done only in a specific manner. The relationship of the Federal Government to a man charged with crime is carefully defined. Its power may be marshalled against him, but only in a defined way. When we allow this substitute method, we make an innovation that does not comport with that due process which the Fifth Amendment requires of the Federal Government. When the Federal Government prepares to inquire into charges that a person has violated federal law, the Fifth Amendment tells us how it can proceed.

The Civil Rights Commission, it is true, returns no indictment. Yet in a real sense the hearings on charges that a registrar has committed a federal offense are a trial. Moreover, these hearings before the Commission may be televised or broadcast on the radio.[3] In our day we have seen Congressional Committees probing into alleged criminal conduct of witnesses appearing on the television screen. This is in reality a trial in which the

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[3] The Rules of the Commission by Subdivision (k) provide:

"Subject to the physical limitations of the hearing room and consideration of the physical comfort of Commission members, staff, and witnesses, equal and reasonable access for coverage of the hearings shall be provided to the various means of communications, including newspapers, magazines, radio, news reels, and television. However, no witness shall be televised, filmed or photographed during the hearings if he objects on the ground of distraction, harassment, or physical handicap."

whole Nation sits as a jury. Their verdict does not send men to prison. But it often condemns men or produces evidence to convict and even saturates the Nation with prejudice against an accused so that a fair trial may be impossible. As stated in 37 A. B. A. J. 392 (1951), "If several million television viewers see and hear a politician, a businessman or a movie actor subjected to searching interrogation, without ever having an opportunity to cross-examine his accusers or offer evidence in his own support, that man will stand convicted, or at least seriously compromised, in the public mind, whatever the later formal findings may be." The use of this procedure puts in jeopardy our traditional concept of the way men should be tried and replaces it with "a new concept of guilt based on inquisitorial devices." Note, 26 Temp. L. Q. 70, 73.

Yet whether the hearing is televised or not it will have all the evils of a legislative trial. "The legislative trial," wrote Alan Barth in Government by Investigation (1955) p. 81, "is a device for condemning men without the formalities of due process." And he went on to say:

> "The legislative trial serves three distinct though related purposes: (1) it can be used to punish conduct which is not criminal; (2) it can be used to punish supposedly criminal conduct in the absence of evidence requisite to conviction in a court of law; and (3) it can be used to drive or trap persons suspected of 'disloyalty' into committing some collateral crime such as perjury or contempt of Congress, which can then be subjected to punishment through a judicial proceeding. 'It is hard to get them for their criminal activities in connection with espionage, but a way has been found,' Senator McCarthy once remarked. 'We are getting them for perjury and putting some of the worst of them away. For that

> reason I hope every witness who comes here is put under oath and his testimony is gone over with a fine-tooth comb, and if we cannot convict some of them for their disloyal activities, perhaps we can convict some of them for perjury.' That they may have been guilty of no violation of law in the first place seems of no concern to the Senator." *Id.*, at 83. And see Telford Taylor, Grand Inquest (1955).

Barth wrote of hearings in the so-called loyalty cases. But the reasons apply to any hearing where a person's job or liberty or reputation is at stake. Barth wrote of hearings held by Congressional Committees. Yet the evil is compounded where the "legislative trial" has become a "Commission trial." And while I assume that a court would not enjoin the typical Congressional Committee, it is duty bound to keep commissions within limits, when its jurisdiction is properly invoked.

The right to know the claims asserted against one and to contest them—to be heard—to conduct a cross-examination—these are all implicit in our concept of "a full and fair hearing" before any administrative agency, as the Court in *Morgan* v. *United States,* 304 U. S. 1, 18, emphasized. We spoke there in the context of civil litigation where property was at stake. Here the need for all the protective devices of a fair hearing is greater. For one's job and perhaps his liberty are hinged on these hearings.

We spoke in the tradition of the *Morgan* case only recently in *Greene* v. *McElroy,* 360 U. S. 474, 496–497.

> "Certain principles have remained relatively immutable in our jurisprudence. *One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so*

> *that he has an opportunity to show that it is untrue.* While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative and regulatory actions were under scrutiny." (Italics added.)

We spoke there in a context where men were being deprived of their jobs as a result of investigations into their loyalty. Certainly no less is required if hearings are to be held on charges that a person has violated a federal law.

Respondents ask no more than the right to know the charges, to be confronted with the accuser, and to cross-examine him. Absent these rights, they ask for an injunction. In the *Greene* case we said these rights were available "where governmental action seriously injures an individual." 360 U. S., at 496. Injury is plain and obvious here—injury of a nature far more serious than merely losing one's job, as was the situation in the *Greene* case. If the hearings are to be without the safeguards which due process requires of all trials—civil and criminal—there is only one way I know by which the Federal Government may proceed and that is by grand jury. If these trials before the Commission are to be held on

charges that these respondents are criminals, the least we can do is to allow them to know what they are being tried for, and to confront their accusers and to cross-examine them.[4] This protection would be extended to them in any preliminary hearing, even in one before a United States Commissioner.[5] Confrontation and cross-examination are so basic to our concept of due process (*Peters* v. *Hobby*, 349 U. S. 331, 351–352 (concurring opinion)) that no proceeding by an administrative agency is a fair one that denies these rights.

References are made to federal statutes governing numerous administrative agencies such as the Federal Trade Commission and the Securities and Exchange Commission; and the inference is that what is done in this case can be done there. This comes as a surprise to one who for some years was engaged in those administrative investigations. No effort was ever made, so far as I am aware, to compel a person, charged with violating a federal law, to run the gantlet of a hearing over his objection.

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[4] Cf. Frankfurter, Hands Off the Investigations, New Republic, May 21, 1924, p. 329, at 331: "It must be remembered that our rules of evidence are but tools for ascertaining the truth, and that these tools vary with the nature of the issues and the nature of the tribunal seeking facts. Specifically, the system of rules of evidence used in trials before juries 'are mainly aimed at guarding the jury from the over-weening effect of certain kinds of evidence.' That system, as pointed out by Wigmore, 'is not applicable by historical precedent, or by sound practical policy' to 'inquiries of fact determinable by administrative tribunals.' Still less is it applicable to inquiries by congressional committees. Of course the essential decencies must be observed, namely opportunity for cross-examination must be afforded to those who are investigated or to those representing issues under investigation."

[5] Rule 5 (b), Rules of Criminal Procedure, provides that the defendant shall be informed of the complaint against him and of his right to retain counsel. Rule 5 (c) expressly states, "The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf."

No objection based either on the ground now advanced nor on the Fifth Amendment was, so far as I know, ever overruled. Investigations were made; and they were searching. Such evidence of law violations as was obtained was turned over to the Department of Justice. But never before, I believe, has a federal executive agency attempted, over the objections of an accused, to force him through a hearing to determine whether he has violated a federal law. If it did, the action was lawless and courts should have granted relief.

What we do today is to allow under the head of due process a fragmentation of proceedings against accused people that seems to me to be foreign to our system. No indictment is returned, no commitment to jail is made, no formal criminal charges are made. Hence the procedure is condoned as violating no constitutional guarantee. Yet what is done is another short cut used more and more these days to "try" men in ways not envisaged by the Constitution. The result is as damaging as summoning before committees men who it is known will invoke the Fifth Amendment and pillorying them for asserting their constitutional rights. This case—like the others—is a device to expose people as suspects or criminals. The concept of due process which permits the invention and use of prosecutorial devices not included in the Constitution makes due process reflect the subjective or even whimsical notions of a majority of this Court as from time to time constituted. Due process under the prevailing doctrine is what the judges say it is; and it differs from judge to judge, from court to court. This notion of due process makes it a tool of the activists who respond to their own visceral reactions in deciding what is fair, decent, or reasonable. This elastic concept of due process is described in the concurring opinion as follows:

> "Whether the scheme satisfies those strivings for justice which due process guarantees, must be judged in

> the light of reason drawn from the considerations of fairness that reflect our traditions of legal and political thought, duly related to the public interest Congress sought to meet by this legislation as against the hazards or hardship to the individual that the Commission procedure would entail."

When we turn to the cases, personal preference, not reason, seems, however, to be controlling.

Illustrative are the First Amendment protection given to the activities of a classroom teacher by the Due Process Clause of the Fourteenth Amendment in *Sweezy* v. *New Hampshire,* 354 U. S. 234, 255, 261–263 (concurring opinion), but denied to the leader of an organization holding discussion groups at a summer camp in *Uphaus* v. *Wyman,* 360 U. S. 72; the decisions that due process was violated by the use of evidence obtained by the forceful use of a stomach pump in *Rochin* v. *California,* 342 U. S. 165, but not when evidence was used which was obtained by taking the blood of an unconscious prisoner. *Breithaupt* v. *Abram,* 352 U. S. 432.

It is said in defense of this chameleon-like due process that it is not "an exercise of whim or will," that it is "founded on something much deeper and more justifiable than personal preference. As far as it lies within human limitations, it must be an impersonal judgment. It must rest on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed." *Sweezy* v. *New Hampshire, supra,* at 267 (concurring opinion). Yet one who tries to rationalize the cases on cold logic or reason fails. The answer turns on the personal predilections of the judge; and the louder the denial the more evident it is that emotion rather than reason dictates the answer. This is a serious price to pay for adopting a free-wheeling concept of due process, rather than confining it to the procedures and devices enu-

merated in the Constitution itself. As said in *Adamson* v. *California*, 332 U. S. 46, 68, 89 (dissenting opinion):

> "In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights."

That was written concerning the meaning of the Due Process Clause of the Fourteenth Amendment. But it has equal vitality when applied to the Due Process Clause of the Fifth Amendment with which we are now concerned.

I think due process is described in the Constitution and limited and circumscribed by it. The Constitution is explicit as respects the permissible accusatory process that the Executive can employ against the citizen. Men of goodwill, not evil ones only, invent, under feelings of urgency, new and different procedures that have an awful effect on the citizen. The new accusatory procedure survives if a transient majority of the Court are persuaded that the device is fair or decent. My view of the Constitution confines judges—as well as the lawmakers and the Executive—to the procedures expressed in the Constitution. We look to the Constitution—not to the personal predilections of the judges—to see what is permissible. Since summoning an accused by the Government to explain or justify his conduct, that is charged as a crime, may be done only in one way, I would require a constitutional amendment before it can be done in a different way.

The alternate path which we take today leads to trial of separate essential parts of criminal prosecutions by commissions, by executive agencies, by legislative committees. Farming out pieces of trials to investigative agencies is fragmentizing the kind of trial the Constitution authorizes. It prejudices the ultimate trial itself; and it puts in the hands of officials the awesome power which the Framers entrusted only to judges, grand jurors and petit jurors drawn from the community where the accused lives. It leads to government by inquisition.

The Civil Rights Commission can hold all the hearings it desires; it can adduce testimony from as many people as it likes; it can search the records and archives for such information it needs to make an informed report to Congress. See *United States* v. *Morton Salt Co.*, 338 U. S. 632; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186. But when it summons a person, accused under affidavit of having violated the federal election law, to see if the charge is true, it acts in lieu either of a grand jury or of a committing magistrate. The sifting of criminal charges against people is for the grand jury or for judges or magistrates and for them alone under our Constitution. In my view no other accusatory body can be used that withholds the rights of confrontation and cross-examination from those accused of federal crimes.

I would affirm these judgments.

Additional Material Relating to Title IV

GMA MEMBER COMPANIES

Abbott Laboratories
American Can Company
American Home Products Corporation
American Potato Company
Amstar Corporation
Anderson Clayton Foods

Baker/Beech-Nut Corporation
Ball Corporation
Basic Vegetable Products, Inc.
Becton, Dickinson and Company
Bissell Inc.
Bristol-Myers Company
Brooke Bond Foods, Inc.
Buhler Mills, Inc

California Canners and Growers
Campbell Soup Company
Campbell Taggart, Inc
Carnation Company
Castleberry's Food Company
Chesebrough-Pond's Inc
The Climalene Company
The Clorox Company
The Coca-Cola Company
Colgate-Palmolive Company
ConAgra
Consolidated Foods Corporation
Continental Can Company, Inc.
CPC International Inc
The Creamette Company
Crown Zellerbach Corporation
Curtice-Burns, Inc.

The d-Con Company, Inc.
Del Monte Corporation
Diamond Crystal Salt Company
Dobbs-Life Savers, Inc.
The Dow Chemical Company
Dr Pepper Company
E. I. duPont de Nemours & Company
Duraflame, Incorporated

Enzo Jel Company
Estee Candy Company Inc.

Fairmont Foods Company
Faultless Starch Company
J. H. Filbert, Inc.
The R T French Company

General Foods Corporation
General Mills, Inc
Gerber Products Company
Glidden-Durkee Division-SCM Corporation
Golden Grain Macaroni Company
W R Grace & Company
Green Giant Company

W J Hagerty & Sons, Ltd , Inc.
Hardy Salt Company
Hartz Mountain Pet Foods, Inc
H. J Heinz Company

Hershey Foods Corporation
Heublein, Inc.
Hills Bros Coffee Inc
Hoffman-La Roche Inc.

Ideal Tea Packing Company, Inc.
International Flavors & Fragrances, Inc
International Multifoods Corporation
International Playtex Corporation
International Salt Company
Interstate Brands Corporation
ITT Continental Baking Company, Inc

Johnson & Johnson
S. C. Johnson & Son, Inc.

Keebler Company
Kellogg Company
Knouse Foods, Inc.
Kraftco Corporation

Lance, Inc.
Land O'Lakes, Inc.
Lawry's Foods, Inc.
Lea & Perrins, Inc.
Lehn & Fink Products Company
Lever Brothers Company
Libby, McNeill & Libby
Liggett & Myers Incorporated
Thomas J. Lipton, Inc.
Lorillard Corporation
Lowe's Inc.
Luzianne Coffee Company

Malt-O-Meal Company
Mars, Incorporated
Oscar Mayer & Company
McCormick & Company, Inc
McIlhenny Company, Inc.
Metal Textile Division
General Cable Corporation
Miles Laboratories, Inc.
Mobil Chemical Company
Moore and Company
Soups Incorporated
Morton-Norwich Products, Inc.
Mrs. Paul's Kitchens
C. F Mueller Company

Nabisco, Inc.
National Can Corporation
The Nestlé Company, Inc.
Norton Simon, Inc

Ocean Spray Cranberries, Inc
Ovaltine Products
Owens-Illinois, Inc.

PepsiCo, Inc.
Pet Incorporated
The Pillsbury Company
The Procter & Gamble Company
Purex Corporation, Ltd.

The Quaker Oats Company

Ralston Purina Company
Reynolds Metals Company
R J. Reynolds Industries, Inc.
Riviana Foods Inc
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Savannah Foods and Industries, Inc.
Scott Paper Company
The Seven-Up Company
Shell Chemical Company
Skinner Macaroni Company
The J. M Smucker Company
A E Staley Manufacturing Company
Standard Brands Inc.
Stegner Foods Products Co , Inc.
Stokely-Van Camp, Inc.
The Stouffer Corporation
Sunkist Growers, Inc.
GTE Sylvania Incorporated

Tasty Baking Company
T-N-T Food Products, Inc.

Wm Underwood Company
Union Carbide Corporation
United States Borax & Chemical Company
Universal Foods Corporation

Van Brode Milling Company, Inc.

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KIRKLAND, ELLIS & ROWE
1776 K STREET, N.W.
WASHINGTON, D.C. 20006

TELEPHONE
(202) 833-8400

CHICAGO OFFICE
KIRKLAND & ELLIS
200 E. RANDOLPH DRIVE
CHICAGO, ILLINOIS 60601
(312) 861-2000

February 24, 1976

Honorable Philip A. Hart
Chairman, Senate Subcommittee
on Antitrust & Monopoly
253 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hart: Re: S. 1284

My statement and presentation of February 3 before the Antitrust Subcommittee on behalf of Grocery Manufacturers of America, Inc. in opposition to Title IV included a reference to Professor Donald F. Turner critical of antitrust treble damage enforcement, citing BNA Antitrust & Trade Regulation Reports of January 20, 1976 (p. 10 & n.17).

I am informed that the reported remarks specifically concerned private rights of action in merger cases, rather than in antitrust cases generally, and would not apply to private treble damage recoveries for such per se offenses as price fixing. As reported by BNA, Professor Turner proposed an across-the-board Congressional review of private antitrust actions, and stated that treble damages should be discretionary, not mandatory, except for perhaps the most blatant cases. 747 BNA ATRR at A-21.

Accordingly, I would appreciate inclusion of this letter in the record, so that the aforementioned reference appears in fuller context.

Very truly yours,

Frederick M. Rowe

FMR/blf

cc: Members of Antitrust
Subcommittee

George W. Koch
President/Chief Executive Officer

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Harry K. Wells, President
McCormick & Co., Inc.

February 24, 1976

The Honorable
Philip A. Hart
United States Senate
253 Russell Senate Office Building
Washington, D. C. 20510

Dear Phil,

On behalf of GMA, I wish to thank you for giving us the opportunity of presenting our views with respect to the Omnibus Antitrust Improvements Act (S 1284).

As set forth in our testimony, we are particularly concerned about what we believe to be the overly broad scope of the parens patriae provisions of Title IV of the bill. We would be glad to cooperate with you and your staff in attempting to work out possible appropriate safeguards.

Meanwhile, enclosed for your information is a copy of GMA's responses to some questions we received from Senator Thurmond following our testimony.

Again, thank you, Phil, for giving GMA the opportunity to testify.

Sincerely yours,

George W. Koch

GWK:mfk

Grocery Manufacturers of America, Inc., 1425 K St., N.W., Washington, D.C. 20005 · (202) 638-6100

KIRKLAND, ELLIS & ROWE
1776 K STREET, N.W.
WASHINGTON, D.C. 20006

TELEPHONE
(202) 833-8400

CHICAGO OFFICE
KIRKLAND & ELLIS
200 E. RANDOLPH DRIVE
CHICAGO, ILLINOIS 60601
(312) 861-2000

February 17, 1976

Honorable Strom Thurmond
4241 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond: Re: S. 1284

This letter is responsive to your questions submitted to me following my testimony on February 3, 1976 on behalf of Grocery Manufacturers of America, Inc. in opposition to Title IV of S. 1284.

1. Q. You mentioned Title IV would provide the potential for abuse by the Attorneys General. Would you care to comment further on the apparent authorization of contingency fee arrangements by state officials with private counsel? Can you give me a scenario?

A. Section I of my February 3 prepared statement relates to this subject matter, and cites examples from recorded proceedings (pp. 4, nn.6-7).

In view of the nature of your question, I reiterate, as I stressed throughout my testimony, my assumption of utmost good faith on the part of all State Attorneys General or private counsel concerned.

Contingent Fee Authority

The apparent authorization of contingency fee arrangements by state officials with private counsel stems from the July 28, 1975 Committee Print's addition to the original S. 1284. The Committee Print redefines State Attorney General, in new Section 4F(1), to include other "authorized" persons, presumably private counsel retained by a State Attorney General.

Since contingency fee arrangements are permissible, and are reported in antitrust litigation,[1] they would apparently be authorized by Section 4F(1) of S. 1284, as revised.

1/ See cases in note 4 infra.

This problem has been recognized by the House Committee on the Judiciary. The Committee's favorable report on H.R. 8532, a proposal similar to S. 1284, Title IV, expressly provides that

> "The term 'State attorney general' means the chief legal officer of a State, or any other person authorized by State law to bring actions under this Act, except that such term does not include any person employed or retained on a contingency fee basis." H.R. Rep. no. 94-499, p. 30 (Sept. 22, 1975) (underscoring supplied).

Potential for Abuse

The magnitude of the antitrust claims authorized by Title IV, by way of claims for all or large groups of state residents, or for the state's "general economy," is obvious.

However, as pointed out by court opinions, large claims filed on behalf of a multitude of claimants, each with a minute individual claim, enhance the potential "conflict of interest" on the part of counsel. Per one recent opinion, "in any class action there is always the temptation for the attorney for the class to recommend settlement in terms less favorable to his clients because a large fee is part of the bargain. The impropriety of such a position is increased where, as here, the attorney is also the representative who brought the action on behalf of the class, and where, as here, the potential recoveries by individual members, including representatives, of the class are likely to be very small in proportion to the total amount of recovery by the class as a whole." Graybeal v. American Savings & Loan Association, 59 FRD 7, 13 (D. D.C. 1973).

Under existing law, courts in such cases are governed by Federal Rule of Civil Procedure 23. Rule 23 establishes specific criteria and safeguards for class actions. Under these Rule 23 safeguards, Courts have dismissed many such claims, on the basis that (1) issues common to the class did not predominate over individual issues (e.g., Cotchett v. Avis Rent-A-Car System, 56 FRD 549 (S.D.N.Y. 1972); (2) class methods were inferior to other methods of adjudicating the issues (e.g., Graybeal v. American Savings & Loan Ass'n., 59 FRD 7 (D. D.C. 1973); (3) the litigation was unmanageable in terms of notice, administrative costs, and complexity (e.g., In re Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974).

However, the present safeguards of Rule 23 would apparently be removed by Title IV, as revised by the July 28 Committee Print, with respect to actions brought by a State Attorney General or "other person" authorized by the state.

I believe this to be so because Section 4C(a)(1) has been changed from the original text of S. 1284 by deleting the prior language which refers to a discretionary judicial authorization of a State Attorney General to act "as a representative of a class or classes consisting of persons residing in that state, who have been damaged." S. 1284, Section 4C(a)(1) (March 12, 1975).

Accordingly, the pre-existing judicial discretion and safeguards under Rule 23 are apparently eliminated by Section 4C(a)(1) of the July 28 Committee Print, which deletes references to classes in suits by Attorneys General.

Consequently, under revised Title IV, the type of case previously dismissed by courts under Rule 23 may be imposed on the courts, notwithstanding abuses of such actions referred to in the judicial opinions cited.

Also, since huge antitrust claims, on behalf of the state's economy or its residents, would be authorized by Title IV, the apparent availability of contingency fee arrangements between state officials and private counsel could become an important incentive for more such actions. An action brought directly by the State Attorney General must presumably be justified by reference to the actual costs to the taxpayer of such antitrust litigation, which may be quite substantial. By contrast, a contingency fee arrangement may eliminate such direct litigation costs for the state, if private counsel is willing to undertake the case on a "contingency" or "percentage of recovery" basis, thus eliminating ongoing financial accountability to the state of the direct cost burden arising from such litigation.

As reflected in judicial decisions,[2/] such suits can obtain large settlements, without ever reaching the merits.

2/ See, e.g., Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 341 F. Supp. 1077 (E.D. Pa. 1972) (settlement of $20 million); West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd., 440 F.2d 1079 (2d Cir. 1971), cert. den., 404 U.S. 871 (1971) (settlement of $100 million). Chief Judge Friendly has pointed out the threat of "blackmail settlements" in such cases. Friendly, Federal Jurisdiction - A General View 120 (1973). See generally Simon, "Class Actions - Useful Tool or Engine of Destruction," 55 FRD 375, 389-394 (1972).

Particularly smaller firms may settle even a marginal antitrust case, because they do not have the expertise or the resources for an effective defense to complex antitrust litigation, and may be exposed to intolerably high contingent liabilities as co-conspirators, jointly and severally, for the amount claimed against all of the defendants.3/

In sum, the apparent contingency fee authorization by Section 4F(1) of the Committee Print creates new exposures and possibilities of abuse beyond the existing law and beyond Title IV of original S. 1284. For, since the state may have nothing to lose financially in an action brought by authorized private counsel on a contingency fee basis, contingency fee arrangements could serve as an incentive for more such actions.

Lack of Judicial Controls

As to judicial control of such contingency fee arrangements, I stated in colloquy on February 3 that I had no really fully informative statistical basis and hence could not give an authoritative answer (Tr. 652).

After some further researching of the problem, I still have no definitive statistical basis for an authoritative answer, but have turned up some court opinions which may be significant.

As noted by the courts in reported opinions, including those placed into the hearing record of February 3,4/ the courts are wrestling with the problem of determining appropriate attorneys' fees, contingent and otherwise, in antitrust litigation. It seems evident that the courts still lack any clear-cut and effective groundrules to control excess.

3/ In this connection, the Ninth Circuit's Kline decision stressed the $750 million joint and several liability by 2000 real estate brokers, dismissing the class action because the prospect of such exposure "would shock the conscience." Kline v. Coldwell, Banker & Co., 508 F.2d 226, 234 (9th Cir. 1974). Judge Duniway said, concurring in that opinion, "[M]any of the named defendants will settle for whatever amount they can bargain for, and without regard as to whether they are really liable or not, with a good chunk of the money going to plaintiffs' lawyers." 508 F.2d at 238.

4/ Lindy Bros. Builders, Inc. of Philadelphia et al. v. American Radiator & Standard Sanitary Corp., 341 F. Supp. 1077 (E.D. Pa. 1972), vacated, 487 F.2d 161 (3d Cir. 1973), opinion after remand, 382 F. Supp. 999 (E.D. Pa. 1974); now on appeal to 3d Circuit; City of Detroit v. Grinnell Corp., 356 F. Supp. 1380 (S.D.N.Y. 1972), aff'd in part, rev'd in part, 495 F.2d 448 (2d Cir. 1974); the opinion on remand is not reported.

For example, in the Lindy Bros. case, the Third Circuit attempted to set up criteria for determining fee awards in antitrust treble damage cases. 487 F.2d 161 (3d Cir. 1973). However, the second district court opinion, 383 F. Supp. 999 (E.D. Pa. 1974), on remand to apply those criteria on attorneys' fees, is still pending on appeal before the Third Circuit, so the application of those principles in the very case which generated them is still an unknown factor.

Moreover, the unreliability of those factors is demonstrated by the most recent published decision of the Third Circuit on December 24, 1975, in Pitchford v. PEPI, Inc., (Nos. 75-1136 and 75-1137), BNA ATRR No. 749, February 3, 1976, p. D-1). According to the Court of Appeals opinion:

> "In a summary order the trial judge awarded $645,250 as an attorney's fee plus costs--over four times the sum set forth in Pitchford's [i.e. the plaintiff's] application. In his order the trial judge cited Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., but did not adduce any explanation for the amount of the award." Id. at p. D-9.

The Court of Appeals reversed that award, and returned it for further consideration and "specific findings and analysis." Id. at D-9.

Actually, the one factor which does appear consistently from the reported cases is that court supervision of attorneys' fees in antitrust treble damage litigation is a very complex and time-consuming process, which itself can take years to litigate in addition to the years of litigation on the merits. In and of itself, this issue casts substantial additional burdens on the courts.5/

5/ The size of this burden is shown by the reported litigation. The Lindy Bros. case, started in the mid-1960's, is still pending today. It already generated three reported opinions on fees alone, and there will be more as a result of the still pending appeals.

Another significant Third Circuit case on legal fees is antitrust treble damage litigation, Merola v. Atlantic Richfield, has been going on from 1971 to date. It too has already generated two opinions by the Third Circuit, 493 F.2d 292 (1974), and 515 F.2d 165 (1975), as well as two unreported district court opinions, solely on the issue of attorneys' fees. When last reported, 515 F.2d 165 (1975), this case was remanded for yet a third district court opinion.

Of course, the reported opinions may be only the proverbial tip of the iceberg. An antitrust defendant may not be too concerned about the split of a settlement fund as between the plaintiffs' monetary recovery and the plaintiffs' attorneys' fees. Only when an issue arises as to an additional award of plaintiffs' attorneys' fees, or when the claimants themselves litigate among themselves over the allocation of attorneys' fees is this issue likely to turn up in reported court opinions.6/

Because of the nature of this question, I respectfully recommend that the Committee obtain authoritative views beyond those of private antitrust attorneys, since counsel for both plaintiffs and for defendants may stand to gain from the proliferation of such actions under Title IV. Such authoritative views may best come from the Judiciary, or from members of the Judiciary, with direct experience in this area.

Possible Scenarios

As for a scenario, my February 3 statement referred to the possibility of massive antitrust actions, on a contingency fee basis, patterned on the facts of the Ninth Circuit's Kline and Telephone decisions. The Kline case involved alleged liabilities of some $750 million against about 2000 real estate brokers on the grounds that brokerage commissions were "fixed." The Telephone Charges case involved claimed damages of $2 each for 40 million people on the grounds that room rates had been raised by a "confusingly mislabeled" charge for telephone services.

My statement also noted the potential of a massive treble damage action, pleaded on behalf of a state's or the District of Columbia's "general economy" or residents, patterned on the recent Federal Trade Commission complaint against the American Medical Association claiming alleged price fixing of doctors' services due to the solicitation and advertising restrictions of the AMA "Principles of Medical Ethics." (FTC Dkt. 9064, Dec. 19, 1975).

6/ Both the Lindy Bros. and Grinnell fee litigations have been among the claimants to the settlement fund. See also Alpine Pharmacy Inc. v. Chas. Pfizer & Co., 1973 Trade Cas. ¶74,350 (S.D.N.Y. 1972).

Particularly since some of the concerns expressed by others as to Title IV relate specifically to its so-called "general economy" treble damage claim authorization, as distinct from the authorization for aggregate treble damages on behalf of state "residents," it should be stressed that the size of damage claims under the "residents" authorization could far exceed such liabilities under the "general economy" provision as revised in the July 28, 1975 Committee Print.

This is so because a massive claim for treble recovery of "overcharges" on behalf of millions of State residents, paying the alleged "overcharge" in the form of higher prices for a product, or for services, may be substantially greater than a claim on behalf of a state's "general economy" which would be "measured by any decrease in revenues or increase in expenditures, or both, of such State or political subdivision, that may with reasonable probability be causally related to the antitrust violation." Section 4C(a)(1)(B). Indeed, any diminished state tax revenues arising from "overcharges" reflected in the higher price of a particular product may be substantially offset by potentially increased revenues to the state from higher taxes by those who collected the alleged "overcharges" in the form of higher product or service prices.

2. Q. It appears that we are now coming out of a recession. What impact, if any, would the passage of S. 1284 have on the economy?

A. The impact of Title IV on the economy is difficult to assess for a non-economist, and I would hence respectfully suggest that the Committee invite the views of objective economists versed in marketing and financial analysis, and also to invite the views of responsible members of the financial community.

Some of the conflicting views as to the impact of antitrust enforcement as an anti-inflationary weapon are collected in a scholarly and documented article by Professor Milton Handler, reprinted in Volume 2 of the Committee's hearings, particularly at pages 624-629.

In my February 3 statement, I expressed concern with the potentially harmful impact of Title IV on the financing and capital access opportunities particularly of smaller firms exposed to huge contingent liabilities arising out of massive antitrust claims. This is so because any business firm, and particularly a smaller firm, which is named as a defendant or co-conspirator in a massive antitrust claim is required by SEC regulations to disclose such "material" liabilities which adversely affect its earnings and financial position. Such disclosures of a multi-million dollar contingent liability, where a recovery cannot be dismissed as remote or impossible in view of the inherent vagueness of the Sherman Act's prohibitions and their judicial interpretation, may preclude a "clean" auditor's report for the company. A "qualified" auditor's report for a business firm, particularly a smaller firm, will obviously be weighed by banks or lender in assessing the safety and risk factors of substantial extensions of credit.7/

Naturally, the diminished ability of a business firm, particularly a smaller firm, to secure capital financing would have an adverse effect on its growth and ability to generate jobs and employment which are particularly important at a time of emergence from an economic recession.

3. Q. The Antitrust Division of the Department of Justice seems to stay fairly busy. What vacuum will S. 1284 fill?

A. I have the highest professional regard for the Antitrust Division of the Department of Justice, and have studied the thoughtful presentation by Assistant Attorney General Thomas E. Kauper at pages 78-119 of the hearings.

Significantly, the Justice Department, while supporting the "basic concept embodied in the parens patriae provisions of Title IV" (Hrgs., p. 93), expressed opposition to the so-called "general economy" provisions in Section 4C(a)(2) of the original S. 1284. These provisions, as modified, appear as Sections 4C(a)(1)(B) of the July 28 Committee Print.

7/ These concerns were confirmed by Mr. Allen P. Stults, Chairman of the Board, American National Bank and Trust Co. of Chicago and Former President, The American Bankers Association. In pertinent part, Mr. Stults, on February 12, 1976 wrote this Committee: "I wish to stress the importance for the national economy of a careful assessment as to how potentially huge contingent liabilities, particularly of smaller firms named as co-conspirators in such antitrust actions, may affect their access to financing and capital markets. * * * In view of SEC disclosure requirements in the financial statements of

In my view, an antitrust action on behalf of all state residents could raise the very same "spectre of massive recoveries based upon unquantifiable and perhaps totally unforeseeable damages multiplied by three" which were the basis of the Department's expressed opposition to the original "general economy" provision (Hrgs., p. 94).

Also, whereas original S. 1284, §4C(a) has been modified by limiting to the Sherman Act the scope of the antitrust violations for which "general economy" or "individual residents" treble damage recoveries are authorized, § 4C(a)(1), nonetheless the same conduct covered by §§ 2 and 7 of the Clayton Act could be pleaded also as violations of the Sherman Act.[8/]

Above all, all violations of the sweeping generalities of the Sherman Act remain subject to Title IV's massive treble damage authorizations, on a retroactive basis. §405.

The problem of "unforeseeable damages" is dramatized by the constantly shifting and expanding interpretations of the Sherman Act's broad prohibitions.

Thus, commercial conduct which may have been long considered entirely lawful can become unlawful by reason of new expansive judicial interpretations. Prominent recent examples of such activities, challenged or adjudged as Sherman Act violations, include

(a) territorial restrictions on distributors' resale of manufacturers' products, United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967);

(b) consignment price arrangements between oil companies and service station retailers, Simpson v. Union Oil Co., 377 U.S. 13 (1964), 396 U.S. 13 (1969);

(c) suggested fee schedules for professionals and services, including:

7/ (cont'd.) public corporations which incur material contingent liabilities in pending antitrust litigation, it is my considered opinion that such antitrust actions may have a substantial adverse impact on the financing opportunities particularly of smaller firms named in such actions. This is so because banks and other financial institutions will necessarily take such substantial contingent liabilities into account in their lending decisions."

8/ Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931); United States v. First National Bank & Trust Co. of Lexington, 376 U.S. 665 (1964).

--attorneys, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); United States v. Oregon State Bar (Civ. No. 74-362, complaint filed May 9, 1974, in U.S. Dist. Ct., Portland, Oregon; dismissed as moot, Oct. 20, 1975, after state bar withdrew fee schedule);

--travel agents, United States v. Orange County Travel Agents, 1975-2 Trade Cas. ¶60,440 (C.D. Cal.)(consent order settling charges against small association of travel agents).

--real estate brokers, United States v. Real Estate Board of Rochester, New York, Civ. No. 74-535 (complaint filed Nov. 19, 1974 in U.S. Dist. Ct., Rochester, N.Y., consent decree entered Dec. 23, 1974, effect of decree stayed pending appeal, Feb. 18, 1975).

Beyond this, anti-solicitation and anti-advertising restrictions by professional associations, such as the AMA's "Principles of Medical Ethics" and comparable restrictions by the opticians, pharmacists, veterinarians, and anesthesiologists, are under current challenge as violations of the antitrust laws. 9/ All of these groups could become subject to huge liabilities in suits under Title IV.

In my view, therefore, Title IV of S. 1284 would fill no real vacuum in antitrust enforcement. Indeed, the "hard core" antitrust violations such as price fixing among competitors, which may be the typical source of the "overcharges" to be recaptured by Title IV, are already subject to criminal penalties of up to three years imprisonment as felonies under the recently stiffened penalty provisions of the Sherman Act.

9/ See FTC releases, Jan. 26, 1976; Dec. 28, 1975; United States v. American Pharmaceutical Ass'n., Civil No. G-75-558-CA5 (filed Nov. 24, 1975, in Grand Rapids, Michigan); United States v. San Diego County Veterinary Medical Ass'n., Civ. 75-1076-N (filed Nov. 14, 1975, in San Diego, California); United States v. The American Society of Anesthesiologists, Inc., Civ. No. 75-4640 (complaint filed Sept. 22, 1975, in U.S. Dist. Ct., New York City).

The justification for Title IV cited by the Justice Department's support for Title IV's parens patriae concept, i.e., the problem of overpayments by multiple small consumers without redress from antitrust violators unjustly profiting from such illegalities, is already addressed by the existing class action authorizations under Federal Rule of Civil Procedure 23 in meritorious cases. Rule 23 permits individual claimants to sue and collect treble damages for any financial injuries caused by antitrust violations, subject to the specific provisions and safeguards of Rule 23 as to the manageability of such actions and their superiority over other forms of litigation.

In my view, any deficiencies in providing appropriate redress arising under Rule 23 are better achieved by an objective and detached assessment of Rule 23 by the Judiciary, including its "notice" requirements, in light of the courts' actual experience over the last decade in class antitrust litigation. Whatever the controversy as to the merits of Title IV, the means and procedures of achieving its objectives through the judicial system requires thoughtful and careful consideration.

Hopefully, such advice and enlightenment by the Judiciary will be available to the Committee in its consideration of Title IV.

Indeed, I am unaware that the Department of Justice, or any other agency of the United States, has to date expressed its position or views as to Title IV of S. 1284 in light of the far-reaching revisions in the Committee Print of July 28.

While the Department has expressed support for the parens patriae concept embodied in H.R. 8532, as reported by the House Committee on the Judiciary on September 22, 1975, H.R. 8532 differs substantially from S. 1284, Title IV as revised by the Committee Print. The July 28, 1975 Committee Print also differs substantially from original Title IV of S. 1284, and differs substantially from H.R. 8532. Among other things, the Committee Print reflects a deletion of the "parens patriae" limiting language in Section 4C(a), and the Committee Print apparently authorizes contingency fee arrangements, as previously discussed.

4. Q. What would the big picture impact be on small business should S. 1284 become law?

A. Particularly in view of the July 28 Committee Print's revisions, I would view Title IV's prospective impact on smaller business firms as negative.

Original S. 1284's provisions authorized "parens patriae" suits by a State Attorney General on behalf of injured "persons" residing in the state, which under established interpretations would have included "injured" corporations or partnerships within the "person" concept. However, Section 4C(a)(1)(A) of the Committee Print has changed this definition so as to limit such suits on behalf of "natural persons" residing in the state. Accordingly, any financial recovery which a smaller firm might have derived from the original Title IV authorization in S. 1284 has now been deleted by the Committee Print's limitation to "natural persons."

More important, my February 3 prepared statement and the preceding discussion highlight the special and negative impact of Title IV, as revised, on the smaller firm. For it is particularly such smaller firms, lacking the litigation expertise and financial resources which the largest companies can mobilize for the successful defense of an antitrust action, which may be specially victimized -- as exemplified by the individual real estate brokers in Kline, or the smaller hotels and motels in In re Telephone Charges.

Indeed, with the recent emphasis by the Department of Justice and the Federal Trade Commission on antitrust enforcement in the area of personal services, rather than product sales, as shown by proceedings against doctors, veterinarians, opticians, pharmacists (noted above), auto repair shops (United States v. Northwest Collision Consultants, Crim. CR 75-375-V, Civ. C-75-837, filed Dec. 3, 1975, in Seattle, Washington), and perhaps others to come, the exposure of such typically smaller business organizations to punitive damage claims by Title IV litigation, by a State Attorney General with or without private auxiliaries, may become even more conspicuous in the future.

* * *

KIRKLAND, ELLIS & ROWE

Hon. Strom Thurmond
February 17, 1976
Page Thirteen

I appreciate the opportunity of responding to your questions, and would respectfully request the inclusion of this letter in the record.

Very truly yours,

Frederick M. Rowe

FMR/blf

cc: Members of Senate Judiciary Committee

western union **Telegram**

MGMPOMT HSA
2-034910E036 02/05/76
ICS IPMMTZZ CSP
2027855610 TDMT WASHINGTON DC 84 02-05 0441P EST
PMS SENATOR JAMES O EASTLAND CHAIRMAN

CARE US SENATE JUDICIARY COMMITTEE
CAPITOL ONE DC 20510

TESTIMONY OF GROCERY MANUFACTURERS TUESDAY TWISTED MY LETTER TO THE ANTITRUST SUBCOMMITTEE OF JUNE 26TH 1975 BEYOND REASONABLE LIMIT OF DEBATE AND MISREPRESENTED MY ACTUAL POSITION. MY ONLY RESERVATION TO TITLE IV, AS MY LETTER MAKES ABSOLUTELY CLEAR, IS THE "DAMAGES TO THE GENERAL ECONOMY" PROVISION. MY SUPPORT AS ATTORNEY GENERAL FOR S.1284, INCLUDING THE TREBLE DAMAGE PROVISION, REMAINS INTACT AND ENTHUSIASTIC. PLEASE INCORPORATE THIS TELEGRAM INTO THE PERMANENT RECORD OF YOUR PROCEEDINGS SO THAT MY POSITION WILL NOT CONTINUE TO BE DISTORTED
FRANK J KELLEY, ATTORNEY GENERAL MICHIGAN

16:41 EST

MGMPOMT HSA

KIRKLAND, ELLIS & ROWE
1776 K STREET, N.W.
WASHINGTON, D.C. 20006

TELEPHONE
(202) 833-8400

CHICAGO OFFICE
KIRKLAND & ELLIS
200 E. RANDOLPH DRIVE
CHICAGO, ILLINOIS 60601
(312) 861-2000

February 10, 1976

FEB 17 1976

Honorable Roman L. Hruska
209 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hruska: Re: S. 1284

In connection with my testimony on behalf of Grocery Manufacturers of America, Inc. on S. 1284, in the hearing before the Antitrust Subcommittee on February 3 which you chaired in Senator Hart's absence, I am informed that Hon. Frank J. Kelley, Attorney General of Michigan, has addressed a telegram to the Committee concerning GMA's characterization of his position on S. 1284.

I do not understand the basis for Mr. Kelley's claim that his position on S. 1284 was misrepresented in GMA's presentation. On the contrary, I stated that Mr. Kelley's letter to the Committee, while favoring some aspects of S. 1284, expressed his concern about others.

Specifically, Attorney General Kelley's letter to the Subcommittee to which reference was made in my testimony, dated June 26, 1975, appears at pages 670-672 of the Subcommittee's hearings.

While this letter expresses general support for S. 1284, and particularly Title IV thereof, the letter expressly states, with respect to the "general economy" treble damage recovery provision, which is one of the two substantive causes of action authorized by Title IV of original S. 1284 and of the Committee Print of July 28, 1975, as follows:

> "Section 4C(a)(2) gives to a state the right to recover damages to its general economy as a result of antitrust violations. This concept has been previously criticized claiming that a proof of damages would be overly vague. I see these criticisms as a confusion of two separate concepts; (1) The nature of the damages charged, and (2) The proof of damages. The fact that a charge may be difficult to prove should not deny to the state an opportunity to attempt

KIRKLAND, ELLIS & ROWE

Hon. Roman L. Hruska
February 10, 1976
Page Two

to prove it before the court. A state has a duty to protect its general economy and to assist in its growth and development. When this development is damaged because of violations of the antitrust laws, right to recover should be available regardless of the difficulty of proving such damages. I would be less than candid if I failed to point out that there is a problem with allowing this type of recovery and it is potentially serious. Broad interpretations may provide a virtually limitless extention of antitrust damage liabilities. Once a violation has occurred, perhaps totally unforeseen occurrences may arise which in computing damages will then be multiplied by three. It is important to prevent antitrust violations to help the general economy of the state, but in the process we do not want to ruin the state's business community. The Congress should carefully consider all the potential effects of Section 4C(a)(2) before its passage." (Underscoring supplied.) (Hrgs., p. 671).

The underscored portion was quoted verbatim in my testimony (Tr., p. 626).

As further pointed out in my presentation, Section 4C(a)(2) of the original S. 1284 was revised in the Committee Print of July 28, 1975, renumbered as Section 4C(a)(1)(B), and broadened by deleting S. 1284's original references to the "parens patriae" concept.

I deem it appropriate to note the concerns expresse by the Michigan Attorney General's letter of June 26, 1975 as to a key substantive provision of S. 1284, notwithstanding his general support for the bill. This was the purport of my presentation for GMA, which also expressed personal esteem for Attorney General Kelley.

Accordingly, I respectfully request the inclusion o this letter in the record, together with Attorney General Kelle communication to the Committee.

Very truly yours,

Frederick M. Rowe

FMR/blf

cc: Members of the Senate Judiciary

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
1150 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20036
(202) 785-5610

C. RAYMOND MARVIN
WASHINGTON COUNSEL

February 6, 1976

The Honorable James O. Eastland
Chairman, Committee on the Judicary
United States Senate
Washington, D.C. 20510

Re: S. 1284, Title IV

Dear Senator Eastland:

A principal thrust of the testimony of an attorney of the Grocery Manufacturers of America, Inc. presented to the Antitrust Subcommittee Tuesday February 3, 1976, was that vesting the State Attorneys General with enforcement authority under the theory of parens patriae would "politicize antitrust enforcement" and create "grave potential for abuse of power and political reprisal". The witness stated that "the temptation for abuse and political grandstanding by such power is plain" and asserted that there exists no "long and honorable tradition of professionalism" of antitrust enforcement at many state levels.

He then characterized the potential judgments as an "antitrust honeypot in the Statehouse" which "invited obvious risks of mismanagement or worse" and alluded to the Watergate era of "the potential for pollution of large money floating in political waters".

The witness' charges are remarkable. They are reckless and unfounded in fact or experience, intemperate in nature, steeped in innuendo and suspicion, and calculated only to detract from the simple merit of this Title. It would plug the loophole of the widespread illegal overcharge which existing law fails to prevent or correct.

Moreover, the witness seriously misrepresented Michigan Attorney General Frank J. Kelley's position by reading from his letter to the Antitrust Subcommittee of June 26, 1975, entirely out of context. Specifically, he distorted General Kelley's position by quoting his reservation to the "damage to the general economy" provision as opposition to the "treble damage" provision. General Kelley has telegrammed you concerning this to assure you that his enthusiastic support for the Bill and the treble damage section remain unaltered.

We had hoped that additional testimony on this legislation would have addressed its merits. It certainly deserves as much. But to poison the wells of debate in this late hour by charging that the chief law enforcement officers of the states, the State Attorneys General, would enforce this law in a less than "honorable" or "professional" way, to label them as "antitrust money collector(s) and entrepreneur(s)" who would "shakedown...corporations" brings the quality of the debate down to an inglorious level of paranoid invective which is an affront to the office of Attorney General and to the dignity of the Senate Judiciary Committee.

We urge you to reject this shallow testimony for the sophistry that it is. We believe that the virtues of the legislation are well defined by the previous debate which any reasonable and fair-minded person can understand. If after due consideration of the long debate on the merits, you agree with the Ford administration, numerous consumer, business and labor organizations and the members of this association that this Bill on balance is in the public interest, then we urge you to report it out now so that the full Senate will have an opportunity to vote thereon.

Sincerely yours,

C. Raymond Marvin

C. Raymond Marvin

RESOLUTION X.

S 1284

Andrew P. Miller
Attorney General of Virginia
Antitrust Committee

WHEREAS, the National Association of Attorneys General recognizes the vital importance of vigorous enforcement of the antitrust laws to a freely competitive economy and the consumers' interests therein; and

WHEREAS, this Association observes that a loophole has emerged in the wake of Hawaii v. Standard Oil and California v. Frito Lay with respect to the parens patriae authority of the Attorneys General; and

WHEREAS, the Association believes that without parens patriae authority a substantial gap will continue to exist leaving the citizens of the states without the substantial protection of the law; and

WHEREAS, this Association holds that the nature of the Office of Attorney General warrants the exercise of parens patriae authority on behalf of the citizens of the several states by the Attorneys General; and

WHEREAS, S. 1284 would grant to the Attorneys General the right to assert parens patriae claims on behalf of said citizens;

NOW, THEREFORE, BE IT RESOLVED THAT:

1. This Association strongly endorses passage of S 1284; and
2. This Association urges the Congress to act promptly on this legislation; and
3. This Resolution be communicated to the appropriate Committees and Members of Congress; and
4. The Association's Washington Counsel is authorized and directed to take all reasonable and appropriate steps to communicate this Association's strong support for passage of S 1284 and to inform members of this Association of the progress and results thereof; and
5. The Special Subcommittee on Legislation of this Association's Antitrust Committee shall monitor and coordinate efforts of the Washington Counsel and members of the Association in regard to said legislation.

ROBERT L. SHEVIN
Attorney General

STATE OF FLORIDA
DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32304

February 25, 1976

Honorable Philip A. Hart
Senate Office Building
Suite 253
Washington, D. C. 20510

Re: S. 1284, Title IV

Dear Senator Hart:

In his testimony of February 3, 1976, before the Antitrust Subcommittee, Mr. Frederick M. Rowe, representing the Grocery Manufacturers of America, characterized the vesting of State Attorneys General with enforcement authority under the parens patriae theory as the creation of a "honeypot in the Statehouse" with "grave potential for abuse of political power and political reprisal." Mr. Rowe, further, cast aspersion upon the professionalism and honor of the State Attorneys General, and, in support of his assertion, excerpts, and completely misconstrues, language from a recent opinion of the Court of Appeals, Fifth Circuit, in State of Florida ex. rel. Shevin v. Exxon Corp., No. 74-3309, January 22, 1976. Mr. Rowe suggests that the Fifth Circuit, in that decision, found me to be an ambitious publicity-seeker. Although my reading of the opinion (copy enclosed for your review) certainly differs from that of Mr. Rowe, I must respond to the tone of his remarks in that he condemns all State Attorneys General through extrapolation of the opinion of the Fifth Circuit, addressed to litigation undertaken by my office.

While a public official must anticipate such attack, and in fact often welcomes it, I suggest that the intemperate nature of Mr. Rowe's remarks are here directed to detracting from the merit of Title IV, drawn to close the existing loophole whereby illegal overcharges are made with impunity, and not to substantive problems of abuse of political power and discretion by myself or my colleagues.

Honorable Philip A. Hart
Page 2
February 25, 1976

Title IV is essential to the creation and maintenance of effective antitrust enforcement at the state level. Absent such legislation billions of dollars annually will continue to be illegally extracted from the consuming public and that public, which has a legitimate expectation that its rights and interests will be protected and promoted by its elected public officials, will be denied the relief, currently provided through the treble-damage mechanism yet unattainable by virtue of the small dollar interest which each consumer may have. Such a bar must not inhibit active antitrust enforcement and I, therefore, respectfully urge your best efforts on passage of S.1284 with Title IV.

With best regards, I remain

Sincerely yours,

Robert L. Shevin

ROBERT L. SHEVIN
ATTORNEY GENERAL

RLS/n
Enc.

JUD-7

February 2, 1976

Honorable Warren E. Burger
The Chief Justice of the United States
United States Supreme Court
Washington, D. C.

Dear Mr. Chief Justice:

The Committee on the Judiciary is currently considering S. 1284, 94th Congress, First Session, which would modify existing procedures for the enforcement of the federal antitrust laws in important respects.

This proposed legislation may have a significant impact upon the judicial system which should be evaluated in our deliberations.

Accordingly, I believe that the Senate would greatly benefit from any views which the Judicial Conference of the United States may care to convey, particularly as to the impact of S. 1284 on the balance between the workload of the courts and their resources to deal adequately with their caseloads.

To be sure, as the Judicial Conference has indicated, the advisability of legislation to broaden consumer remedies is primarily a matter of legislative policy.

However, the legislative process would be substantially enlightened by any views of the Judicial Conference, particularly as to the resources necessary for the effective discharge of the additional responsibilities assigned by S. 1284 to the judicial system for the processing of the broadened antitrust class actions which could be filed by State Attorneys General or other authorized counsel, on a fee basis or otherwise, on behalf of a State's residents.

We would, of course, be honored and interested torreceive any other views of the Judicial Conference in light of the bill's impact on practice under Federal Rules of Civil Procedure 23.

I take the liberty of enclosing the current Committee Print of S. 1284, and a request for information from Mr. Rowland F. Kirks, Director, Administrative Office of the United States Courts.

Very truly yours,

Roman L. Hruska
United States Senator
Nebraska

RLH:hh
Enclosures

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

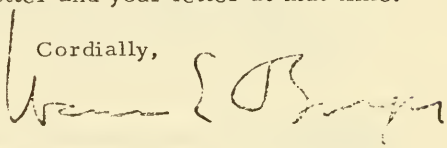
February 9, 1976

Re: S. 1284

Dear Senator Hruska:

I have your letter of February 2. The Judicial Conference will meet April 7 and we will present the above matter and your letter at that time.

Cordially,



Honorable Roman L. Hruska
United States Senate
Washington, D.C. 20510

JUD-7

February 2, 1976 h

Rowland F. Kirks, Esq.
Director, Administrative Office of
the United States Courts
Washington, D. C.

Dear General:

The Senate Committee on the Judiciary is currently considering S. 1284, 94th Congress, First Session, which would modify the enforcement of the antitrust laws in important procedural and substantive respects.

To assist the Committee's deliberations and assessment of this important legislation, and particularly its impact on the judicial system, I would greatly appreciate receiving, at your early convenience, your considered views as to the following:

(1) The degree of burden which class actions to enforce the antitrust laws presently place on the dockets of the District Courts in major cities, due to the nature and duration of such litigation.

(2) Any available statistics as to pending cases and backlogs in districts substantially involved in private antitrust and class antitrust litigation, and as to recent trends in the volume of such litigation.

(3) Your estimate as to any impact of such case backlogs and trends on the processing of federal criminal caseloads in key districts involved in processing private antitrust and antitrust class actions.

(4) Your best estimate as to the amount of the additional appropriations or assistance which might be necessary for the judicial system to discharge effectively the new responsibilities which would be assigned to the courts by S. 1284.

For your information in this connection, I enclose the current Judiciary Committee Print of S. 1284.

Your attention is invited to Title IV, especially Sections 4C and 4F, authorizing antitrust class actions not only by the Attorney General of any State, but also by other counsel so authorized by the State, under fee arrangements or otherwise, to recover treble damages on behalf of its residents, plus attorneys' fees and other expenses of the litigation.

Also, you may wish to consider the potential increase in such litigation due to the size of possible awards on behalf of large classes, including attorneys' fees and litigation expenses, and in view of the proposed elimination of the requirement of separate proof of the fact and of the amount of injury to individual claimants.

Your views would be especially helpful in light of the informative testimony which you, with the late Chief Judge Murrah, presented to this Committee on August 31, 1970, in connection with S. 3201, the Consumer Protection Act of 1970, which also proposed to broaden the availability of class actions on behalf of its residents, plus attorneys' fees and other expenses of the litigation.

As for your letter of July 23, 1975, to Representative James R. Mann in reference to H. R. 8532, we would greatly appreciate the more detailed information requested above. In this connection, please note that S. 1284 does not contain the prohibition of contingency fee arrangements which is part of H. R. 8532 as reported. H. R. Report No. 94-999, 94th Congress, First Session, pages 17-18.

Very truly yours,

Roman L. Hruska, U.S.S.

RLH:hh
Enclosure

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

ROWLAND F. KIRKS
DIRECTOR

WILLIAM E. FOLEY
DEPUTY DIRECTOR

CARL H IMLAY
GENERAL COUNSEL

February 2, 1976

Honorable Roman L. Hruska
United States Senate
209 Russell Senate Building
Washington, D. C. 20510

Attention: Mr. Chumbris

In re: S. 1284

Dear Senator Hruska:

Mr. Chumbris has asked me concerning various positions taken by the Judicial Conference of the United States on consumer legislation and on legislation that involves class actions. I attach various documents reflecting Judicial Conference positions taken over the last four years.

In connection with a conversation that Mr. Chumbris had concerning Section 21 of S. 1284, specifically on the use of economic experts, I also forward to you a copy of a communication to this office from the Department of Justice indicating a disagreement as to how economic experts are to be compensated. It has been our position that their compensation is to be taxed against the parties as costs of the litigation either under Rule 706 of the Federal Rules of Evidence or under Rule 53(a) of the Federal Rules of Civil Procedure. The Department of Justice seems to take another position. In any event, I have suggested that perhaps some clarification of this issue in Section 21 might be appropriate.

Sincerely,

Carl H. Imlay
General Counsel

Enclosures

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

ROWLAND F. KIRKS
DIRECTOR

WILLIAM E. FOLEY
DEPUTY DIRECTOR

CARL H. IMLAY
GENERAL COUNSEL

000462

FEB 6 3 45 PM '76

February 3, 1976

Honorable Roman L. Hruska
United States Senate
Washington, D. C. 20510

Dear Senator Hruska:

In the absence of Mr. Kirks on Judicial Conference business, I am writing to acknowledge your letter of February 2nd with reference to S. 1284, a bill to modify the enforcement of the antitrust laws.

I appreciate your extending the opportunity for the Administrative Office to address the issues presented in your letter with reference to the burden presently imposed by class action antitrust litigation upon the caseload of the United States district courts and the projected budgetary impact of this legislation upon the Federal Judiciary.

My office and our Division of Information Systems are now studying this bill with a view toward analyzing and resolving these questions. I would therefore respectfully request that we be allowed a short time in which to prepare a comprehensive response, with the understanding that Mr. Kirks will advise you further with respect to this matter in the very near future.

Sincerely,

Carl H. Imlay

Carl H. Imlay
General Counsel

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

ROWLAND F. KIRKS
DIRECTOR

WILLIAM E. FOLEY
DEPUTY DIRECTOR

CARL H. IMLAY
GENERAL COUNSEL

February 17, 1976

Honorable Roman L. Hruska
United States Senate
Washington, D. C. 20510

Dear Senator Hruska:

You will recall my letter of February 3, 1976 with reference to S. 1284, a bill to modify the enforcement of the antitrust laws.

Since that time the Chief Justice has placed the matter of this bill on the agenda of the April 7th session of the Judicial Conference of the United States. There will therefore be forthcoming the Conference's report on the bill which will express the views of the Judiciary.

In the meanwhile, as promised in my letter of February 3rd, I enclose impact studies of class actions and antitrust cases prepared by our Division of Information Systems.

Perhaps the most significant study relates to the median time intervals involved in disposition of private antitrust cases (twice the time of other civil litigation), plus the gain in absolute numbers of such cases being filed and in such cases pending. Also, there has been a gain in private antitrust class actions.

We are prepared to offer any further assistance pending the report of the recommendations of the Judicial Conference.

Sincerely,

Carl H. Imlay
General Counsel

Enclosures

Districts With Thirty or More
Private Antitrust Filings in Fiscal Year 1975
(Data are shown for Fiscal Years 1973-1975)

District	Total Civil Filings			Private Antitrust Filings						Class Action Antitrust Filings[1]		
				1973		1974		1975				
	1973	1974	1975	Number	% of Total	Number	% of Total	Number	% of Total	1973	1974	1975
District of Columbia	2,811	2,003	2,029	34	1.2	63	3.1	30	1.5	7	2	4
Massachusetts	4,091	4,863	5,045	38	.9	27	.6	36	.7	-	1	4
New York, Southern	5,680	5,639	6,282	106	1.9	95	1.7	109	1.7	21	8	16
New Jersey	1,895	1,951	2,244	29	1.5	18	.9	35	1.6	5	2	5
Pennsylvania, Eastern	2,890	3,173	3,539	64	2.2	53	1.7	59	1.7	8	4	8
Pennsylvania, Western	1,271	1,345	1,629	20	1.6	31	2.3	32	2.0	-	2	-
Florida, Southern	2,168	2,031	2,853	23	1.1	36	1.8	59	2.1	6	9	15
Georgia, Northern	2,032	2,668	2,731	12	.6	11	.4	32	1.2	1	2	16
Illinois, Northern	3,395	3,438	4,075	95	2.8	65	1.9	78	1.9	18	3	16
Minnesota	1,131	1,043	1,174	29	2.6	18	1.7	34	2.9	14	2	10
Missouri, Western	1,596	1,657	1,854	39	2.4	25	1.5	33	1.8	1	2	4
California, Northern	2,322	2,647	2,751	81	3.5	76	2.9	94	3.4	7	3	24
California, Central	3,118	3,420	4,282	82	2.6	78	2.3	78	1.8	6	7	2

[1]These cases are included in the private antitrust case filings.

Prepared by: Statistical Analysis and Reports Branch
Division of Information Systems
Administrative Office of the U. S. Courts
Washington, D. C. 20544
February 10, 1976

Civil Cases Pending in District Courts
With Thirty or More Private Antitrust Filings in 1975
(Data are Shown for Fiscal Years 1973-1975)

District	Total Civil Cases Pending			Private Antitrust Cases Pending						Class Action Antitrust Cases Pending[1]		
				1973		1974		1975				
	1973	1974	1975	Number	% of Total	Number	% of Total	Number	% of Total	1973	1974	1975
District of Columbia	2,471	1,760	1,741	83	3.4	125	7.1	134	7.7	38	44	44
Massachusetts	6,968	8,945	10,422	90	1.3	92	1.0	93	.9	1	13	14
New York, Southern	10,596	8,582	8,182	263	2.5	234	2.7	209	2.6	45	36	35
New Jersey	2,601	2,801	2,056	41	1.6	40	1.4	50	1.8	1	2	3
Pennsylvania, Eastern	4,303	3,749	3,699	483	11.2	148	3.9	107	2.9	17	17	14
Pennsylvania, Western	1,200	1,250	1,527	41	3.4	53	4.2	61	4.0	2	4	2
Florida, Southern	943	980	1,443	26	2.8	37	3.8	64	4.4	6	11	18
Georgia, Northern	1,321	1,915	2,073	24	1.8	25	1.3	37	1.8	4	4	18
Illinois, Northern	2,683	2,902	3,422	151	5.6	164	5.7	157	4.6	49	62	46
Minnesota	1,101	1,216	1,439	96	8.7	99	8.1	112	7.8	32	48	48
Missouri, Western	1,074	1,147	1,354	60	5.6	69	6.0	70	5.2	3	9	13
California, Northern	2,878	2,840	2,857	384	13.3	274	9.6	207	7.2	8	16	36
California, Central	2,720	3,196	3,692	160	5.9	141	4.4	125	3.4	11	19	3

[1]These cases are included in the private antitrust cases pending.

Prepared by: Statistical Analysis and Reports Branch
Division of Information Systems
Administrative Office of the U. S. Courts
Washington, D. C. 20544
February 10, 1976

U.S. District Courts
Civil Cases Filed Showing
Private Antitrust Cases and Class Action Antitrust Cases

Fiscal Year	Total Civil Filings	Total Private Antitrust Filings		Private Antitrust-Class Actions	
		Number	% of Total Civil Filings	Number	% of Total Civil Filings
1973	98,560	1152	1.2	156	.16
1974	103,530	1230	1.2	113	.11
1975	117,320	1375	1.2	189	.16

U.S. District Courts
Median Time Intervals From Filing to Disposition in Civil Cases

Fiscal Year	All Civil Cases		Private Antitrust Cases	
	Total Terminated*	Median Time Interval In Months	Total Terminated	Median Time Interval In Months
1973	80,598	10	981	15
1974	79,101	9	1473	23
1975	85,420	9	1341	18

*Excludes land condemnation cases, prisoner petitions and deportation reviews.

Prepared by: Statistical Analysis and Reports Branch
Division of Information Systems
Administrative Office of the U. S. Courts
Washington , D. C. 20544
February 10, 1976

Attachment A

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

ROWLAND F. KIRKS
DIRECTOR

WILLIAM E. FOLEY
DEPUTY DIRECTOR

July 23, 1975

Honorable James R. Mann
U. S. House of Representatives
Washington, D. C. 20515

Re: H.R. 8532, to amend the Clayton Act to permit State attorneys general to bring certain antitrust actions, and for other purposes

Dear Mr. Mann:

I greatly appreciate receiving your letter of July 17th requesting information on the potential impact of the provisions of H.R. 8532 on the caseloads of the United States district courts. Assessing the impact of new legislation on the workload of courts is a difficult task, particularly when it must be done on short notice. These, however, are our thoughts with respect to H.R. 8532.

As indicated in your letter, the bill would authorize the states, acting through their Attorneys General or other chief legal officers, to bring three kinds of antitrust actions in the United States district courts. The bill would also authorize similar actions to be brought by the Attorney General of the United States under specified circumstances. Thus the control of litigation would be in the hands of government officials who may properly be expected to act responsibly in the screening of cases to be filed in the district courts. For this reason we would not expect the cases filed under this bill to be numerous, although we have no information on which to base a firm estimate.

At the same time the workload that would be imposed upon the districts by the bill is likely to be substantial. Antitrust cases, by their nature, are frequently complex, hard-fought, and time-consuming. This would be especially true if they were filed as class actions. The requirement of notice and the expense thereof could be substantial, and if individual notices rather than notice by publication is required, a large additional burden would be placed on the clerical staffs of the courts. Also collateral questions as to the adequacy of notice, the composition of the class, and the exercise of options by individuals not to be included in the class would undoubtedly require additional court and clerical time. One case such as this could, potentially, tie up a court for a long period of time. If as many as 50 cases per year were filed in the district courts (approximately one per jurisdiction) substantial additional resources would have to be allocated to the Federal judiciary in order to process the litigation.

I regret that we are unable to be more specific in our estimates. In the past the Judicial Conference of the United States has suggested to the Congress that the proponents of legislation, who presumably have first-hand knowledge of the problems addressed by the legislation and are in the best position to know its potential impact on the courts, be requested to furnish information to the Congress. If possible, may I suggest that this course also be pursued with respect to this legislation.

I would also like to express our sincere thanks to you for your interest in the efficient operation of the Federal courts and to assure you of our willingness to be of any further assistance we can.

Sincerely,

Rowland F. Kirks

Rowland F. Kirks

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

SEP 25 1975

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in response to the letter of Mr. Alan A. Ransom of your staff, seeking our views on H.R. 8532, which now has been favorably reported out of the Committee on the Judiciary. You will recall that I appeared before the Subcommittee on Monopolies and Commercial Law on March 18, 1974, and testified in considerable detail about an earlier version of the bill. Subsequently, I again had occasion to consider the advisability of parens patriae legislation, this time in connection with S. 1284. See Hearings on S. 1284 before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate, pp. 93-96 (1975).

The Administration has taken a position in support of the basic concept of permitting a State to sue on behalf of its citizens for damages sustained because of violations of the Sherman Act. H.R. 8532 would establish a workable mechanism for assuring that those antitrust violations which have the broadest scope and perhaps the most direct impact on consumers do not escape civil liability.

Antitrust violations that result in relatively small economic damage to each of a large number of people are very troublesome: the economic incentives for such conduct are made more alluring by the realization that no single consumer has a sufficient economic stake to bear the litigation burden necessary to maintain a private suit for recovery under Section 4. Although it was once thought that the 1966 liberalization of Federal Rule of Civil Procedure 23 might provide a satisfactory mechanism for effectuating the deterrent objectives of Section 4, the class action device is apparently of limited utility in securing relief for large classes of individual consumers, see Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

The parens patriae concept, as embodied in H.R. 8532, is both desirable and useful from the perspective of better antitrust enforcement. Such a provision is also consistent with the enforcement goals of the Clayton Act.

In our view, with only minor exceptions, the parens patriae provisions of H. R. 8532 are appropriately designed and limited to serve these goals.

Section 4C(b) of the bill authorizes a court, in any suit brought pursuant to Section 4C(a), to order that the state attorney general proceed "as a representative of any class" of persons alleged to have been injured by a violation of the antitrust laws. Given the broad parens patriae authority conferred in Section 4C(a), I remain uncertain of the purpose to be served by Section 4C(b), and I continue to be apprehensive about the entanglement of parens patriae authority with interpretive problems of Rule 23. When I testified before the Subcommittee on Monopolies and Commercial Law in early 1974, the Eisen case had not yet been decided by the Supreme Court. The Court's decision is suggestive of the panoply of problems presented by large class actions, and I would be reluctant to make the effectiveness of H.R. 8532 dependent upon judicial construction of Rule 23. H.R. 8532 imposes certain requirements upon parens patriae actions that are less burdensome than corresponding provisions of Rule 23. Compare the notice provisions of Section 4C(c) with Rule 23(c)(2). Those less onerous requirements may be quite reasonable when taken in the context of the traditional responsibilities of an attorney general to the citizens of his State. But Section 4C(b) apparently contemplates the possibility of a class action on behalf of citizens outside the State represented by the attorney general, and in those circumstances it is unclear whether a departure from the carefully developed protections of Rule 23 is desirable. We continue to believe that deletion of Section 4C(b) would strengthen the bill.

In order to forestall any uncertainty, the Administration favors inclusion of a provision in H.R. 8532 that would make it clear that the States could sue to recover treble damages for the entire amount of overcharges or other damages sustained in connection with any federally

funded state program. Under current law, it is not clear whether a State has the power under the Clayton Act to sue for such damages, but we see no reason why States should be denied the power in circumstances such as these where the deterrent purposes underlying Section 4 would be advanced. Section 4E(a) of S. 1284 contains such a provision, which we have supported, and we favor amending H.R. 8532 to conform in this respect to S. 1284.

Section 4G(1) defines the term "state attorney general" so as to exclude "any person employed or retained on a contingency fee basis." The impact that this limitation will have upon the effectiveness of the parens patriae legislation is sufficiently unclear so as to warrant careful consideration. While the primary goals of H.R. 8532 are to increase the deterrent force of the Clayton Act and provide redress for injuries caused by antitrust violations, this legislation would accomplish these objectives in a way that might have beneficial consequences extending far beyond this rationale. By drawing state attorneys general directly into the enforcement of the federal antitrust laws, the long run impact of H.R. 8532 may be to encourage the development and sophistication of state antitrust enforcement capacities.

We certainly would welcome that development, and the definition of "State attorney general" presently contained in the bill would probably force States to develop internal antitrust enforcement capacity. Such a proposition, however, is not without its trade-offs. By depriving States of the option of retaining outside counsel on a contingency fee basis, the bill would delay full implementation of the parens patriae authority until such time as States could start-up a program of rigorous antitrust enforcement. While this is a short-run concern, the restriction might cause some smaller States, with limited law enforcement personnel, to forego completely antitrust enforcement because of the impracticality of internal development. The contingency-fee scheme has proven to be an important spur to antitrust enforcement, however, the Administration has not taken a position with regard to this provision.

Finally, the Administration has taken no position with regard to the provision in Section 3 that requires an award of attorneys' fees to a private party who secures injunctive relief in a suit brought under Section 16 of the Clayton Act.

The provisions of this legislation about which I expressed primary concern in my earlier testimony have largely been eliminated or satisfactorily modified. While we think the further refinements suggested above would strengthen the bill, we would still urge enactment of this legislation.

The Office of Management and Budget has advised this Department that it has no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely yours,

Thomas E. Kauper

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
1150 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20036
(202) 785-5610

C. RAYMOND MARVIN
WASHINGTON COUNSEL

February 27, 1976

The Honorable Philip A. Hart
United States Senate
Washington, D.C. 20510

Dear Senator Hart:

I understand that the record has recently become confused concerning the direct financial benefits which consumers would experience individually as a result of Title IV of S. 1284. We believe that parens patriae claims authorized under the Title would result in wide-spread repayment of overcharges to large numbers of consumers in those instances where an attorney general proved to the court that a violation occurred and that liability existed. We believe that the record of antitrust cases supports this view.

The landmark Tetracycline cases are instructive. A total of $28,003,075.33 was distributed directly to 1,027,265 consumers throughout the nation. Enclosed is a tabulation of that information by state, city, and county. The fact that the $28 million was part of a settlement between the parties rather than a jury verdict is entirely immaterial to the issue of individual consumer reimbursement.

These figures support the view that the type of case envisioned by Title IV <u>does</u> in fact result in repayment to consumers. The figures also show that the later group of states, the Minnesota group, learning from the frontier experience of the first group in New York, achieved a significantly higher consumer response and lead to the conclusion that efficient methods of identifying injured consumers are already being developed. In the most fundamental sense, then, this legislation is for the benefit of consumers and they will be affected directly and personally by the Judiciary Committee's action on this Title.

Honorable Philip A. Hart
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Wholly apart from the $28,003,075.33 which was paid directly to consumers, the Tetracycline case is also evidence for the point that unclaimed consumer funds can be administered under traditional fiduciary concepts fairly and efficiently and for such public purposes as the court may find appropriate in the circumstances of each case.

Respectfully submitted,

C. Raymond Marvin

Enclosure

CRM/mla

Summary of Consumer Recovery In Tetracycline Litigation

Southern District of New York

Entity	Consumers	Amount Paid
Alabama	280	$ 74,417.00
Alaska	6	1,003.53
Arizona	543	126,663.97
Arkansas	143	47,618.12
Colorado	178	40,870.69
Denver, Colorado	135	18,873.12
Connecticut	793	141,556.75
Delaware	100	22,404.00
Washington, D.C.	289	66,373.54
Florida	828	183,262.35
Tampa, Florida	11	3,753.18
Georgia	319	87,634.23
Honolulu (city & county)	45	12,235.96
Idaho	80	16,019.12
Illinois	585	127,474.85
Chicago	263	71,688.10
Indiana	201	44,247.36
Iowa	819	94,882.34
Kentucky	103	36,268.69
Louisiana	328	145,554.61
Maine	67	7,839.42
Maryland	609	130,528.48
Baltimore City	84	16,055.76
Massachusetts	452	107,655.31
Boston	66	20,441.85
Michigan	3,575	710,453.25
Dearborn	106	17,594.56
Detroit	714	201,386.02
Lansing	99	25,181.09
Madison Heights	14	3,635.87
Township, Redford	1	400.00
Minnesota	413	76,483.83
Mississippi	163	66,293.39
Missouri	566	127,779.97
Montana	81	17,668.32
Nebraska	128	25,599.09
Nevada	30	8,362.31
New Hampshire	33	16,258.31
New Jersey	987	202,455.19
New Mexico	192	54,097.63
New York State	4,056	887,222.29
City of Buffalo	47	10,620.39
Erie County	63	10,763.96
New York City	5,229	1,220,070.11

Summary
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North Dakota	142	17,037.09
Ohio	780	173,630.95
Akron	13	9,826.59
Cleveland	80	30,508.20
County of Summit	3	969.31
Oklahoma	264	62,942.85
Pennsylvania	1,286	264,492.82
Allegheny County	175	48,893.67
Philadelphia	1,086	282,144.08
Pittsburgh	394	91,441.63
Puerto Rico	67	11,954.53
Rhode Island	293	60,058.17
South Carolina	62	6,413.94
South Dakota	125	24,392.09
Tennessee	69	31,516.46
Nashville/Davidson County	29	6,966.95
Memphis	17	5,239.68
Texas	4,359	1,186,412.28
Vermont	70	14,105.53
Virginia	1,988	142,916.28
West Virginia	97	24,401.69
Wisconsin	1,171	131,738.26
Wyoming	26	5,228.81
Total	36,414	* $7,956,849.78

* An additional 41 checks totalling $17,342.23 were written to consumers who surfaced after distribution.

Exhibit A-1 to Schedule 1, next to the "Report of Special Master Kissam, dated December 9, 1975, Recommending Termination of Settlement Proceedings, Filed in the United States District Court for the Southern District of New York, in the action entitled, The State of West Virginia v. Charles Pfizer and Co., Inc., et al. (68 Civ 240)

Summary of Consumer Recovery In Tetracycline Litigation

Minnesota Case

Entity	Consumers	Amount Paid
Washington	78,701	$ 2,162,799.69
Oregon	61,683	1,038,428.77
California	746,653	14,300,309.41
Utah	28,101	646,244.92
Kansas	73,268	1,792,757.81
Hawaii (except Honolulu)	2,445	105,684.95
TOTAL	990,851	$20,046,225.55

On file with District of Minnesota, Judge Miles W. Lord

State of Washington, et al. v. Charles Pfizer & Co., Inc. et al.
(471 Civ. 435)

(Published - New York Law Journal - February 26, 1976)

Parens Patriae Legislation: An Answer to Milton Handler

Milton Handler's diatribe against the proposed Hart-Scott Antitrust Improvements Act (S. 1284) is reminiscent of Wall Street's reaction to the enactment of the Sherman Act in 1890. The first Justice Harlan noted in the Northern Securities case that

> "Many suggestions were made in argument based upon the thought that the anti-trust act would, in the end, prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions."1/

Of the several antitrust improvements proposed in the Hart-Scott Bill, Mr. Handler is correct in suggesting that the most important is Title IV, captioned "Parens Patriae Amendments." This part of the Bill is specifically calculated to "protect the public against the exactions" of antitrust violators by making antitrust violators answerable to the individual members of the consuming public whom they injure. The core provision of Title IV, which corresponds generally to H.R. 8532 as reported out by the House Judiciary Committee and the Rules Committee,2/ authorizes

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1/ Northern Securities Co. v. United States, 193 U.S. 197, 351 (1904).

2/ H.R. Rep. No. 94-499, September 22, 1975. The Rules Committee reported out the Bill on February 10, 1976.

the Attorneys General of the several States to sue for treble damages on behalf of natural persons residing in their States; damages may be assessed in the aggregate "on the basis of statistical or sampling methods, or such other reasonable method of estimation as the court in its discretion may permit," and are then to be distributed to the individual victims in an "appropriate" manner with any surplus to be utilized "in accordance with State law or as the district court may in its discretion authorize."

There is not space here for a full analysis of the proposed parens patriae remedy. That can be found in the House Judiciary Committee's Report on H.R. 8532 and in the extensive hearings that have been held on both that Bill and the Hart-Scott Bill. A brief discussion of Mr. Handler's principal objections may, however, suggest that the "iniquitous character" of the proposal is not as self-evident as he would have us believe.

The most important thing about the parens patriae provision is that, as the House Report explains, it creates no new substantive liability:

> "Each person on whose behalf the State attorney general is empowered to sue already has his own cause of action under section 4 of the Clayton Act, even if, for practical reasons, the right to sue is not likely to be exercised. [The parens patriae provision] thus provides an alternative means to make practically available Federal remedies at law, previously denied, for the vindication of existing substantive claims. * * * The establishment of an alternative remedy does not increase any defendant's liability. To the extent an antitrust violator was liable to

> an individual, [the provision] would make the violator liable to either the individual or the State. The likelihood of a financial recovery against an antitrust violator, however, is significantly increased because [the provision] creates an effective remedy where none existed before. 3/

Mr. Handler's contention that the parens patriae provision would "dispense with proof of injury" and assess "unquantified penalties" "bearing no reasonable relationship to the harm caused by an antitrust infraction" is totally inaccurate. In fact, the State would have to prove its case exactly as an individual antitrust plaintiff would, the only difference being that the proof would be on behalf of the State's consumers collectively. The State would have to carry the traditional burden of proving (1) that there was an antitrust violation, (2) that the violation injured consumers and (3) the amount of the actual damages to consumers in the aggregate. The proposed statutory standard for determining damages merely codifies what has been the law for many years -- that antitrust damage determinations may be based upon "a just and reasonable estimate of the damage based on relevant data,"[4/] and are proper "although the result be only approximate."[5/] Indeed, one could reasonably expect greater certainty

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3/ H.R. Rep. No. 94-499 at p. 9.

4/ Bigelow v. RKO Pictures, 327 U.S. 251, 264 (1946).

5/ Story Parchment Co. v. Paterson Parchment Co., 282 U.S. 555, 563 (1931).

as to actual damages than is common in single-plaintiff antitrust cases if, for example, the issue were how much bread or gasoline was purchased by the residents of New York during a particular period and what the across-the-board price effects were of a hypothetical price fixing conspiracy. Surely this is more readily quantifiable then what the profits of a movie theater would have been from films it never showed.

We fail to understand -- and Mr. Handler's ipse dixits do not help us -- what is so "monstrous" or "plainly unconstitutional" about requiring a proven antitrust violator to disgorge the money he has unlawfully taken from his victims. Certainly there is nothing unconstitutional about treble damages, which have been provided for in the antitrust laws since 1890. And it has long been established that a State has the general right "to sue as parens patriae to prevent or repair harm to its 'quasi sovereign' interests," which include the protection of its individual citizens' pocketbooks.[6/]

To be sure, the combination of traditional treble damages and a meaningful consumer remedy makes the stakes much higher for antitrust violators as a practical matter. The price of being caught may now go from zero to an amount some violators cannot afford.

6/ Hawaii v. Standard Oil Co., 405 U.S. 251, 259 (1972); Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945); Illinois v. Bristol-Myers Co., 470 F.2d 1276 (D.C. Cir. 1972).

Many people would say that is just the point -- to make the price of violating the antitrust laws high enough to deter potential violators, as it has not been for the most part. Congress might, of course, conclude that the provision of a meaningful consumer remedy would have enough deterrent value in itself to make something less than treble damages appropriate in such cases, particularly if it could be established that the violation was not willful. But that is a separate policy determination to be made by Congress.

In an attempt at overkill, Mr. Handler goes on to claim that the damages collected in a parens patriae action would not be claimed by individual consumers and would "inevitably" be nothing more than "a bonanza to the states and to their outside lawyers." This claim is unsupported by any facts and is contrary to what actually happened in the Antibiotics class actions, where there were very meaningful recoveries by individual consumers.[7/] Distribution of recoveries under the parens patriae provision would, of course, be more readily feasible than in class actions, and there would be room for a substantial amount of judicial creativity in determining what would be "a reasonable opportunity" for an individual "to secure his appropriate portion of the net monetary relief." In many instances distribution could be made on the

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7/ See Statement of David I. Shapiro in Hearings on S. 1284 before Subcommittee on Antitrust and Monopoly of Senate Judiciary Committee ("Senate Hearings") at pp. 342-343.

basis of data about individual consumers that is already available from their State income tax returns, and there is no reason why the payment could not be made in the form of a tax credit with substantially no administrative expense. For example, the amount of each taxpayer's purchases of foodstuffs could be statistically estimated with a high degree of certainty based upon the information about family size given in the tax return, and the amount of his damages in a hypothetical gasoline price fixing case could be determined on the basis of the annual mileage figures used for purposes of the gasoline tax deduction.

Mr. Handler fails to acknowledge that parens patriae actions would be subject generally to the same kind of judicial supervision and other protections of individuals' rights that characterize class actions under Rule 23 of the Federal Rules of Civil Procedure. There is a provision for notice to the affected individuals in accordance with the established constitutional requirements and individuals would be given the opportunity to "opt out" if they wish to pursue their own claims or simply not participate. No parens patriae case could be settled without court approval after notice to affected persons, and it is clearly implicit that any deduction from a settlement for payment of counsel would be reviewed by the court.

Nobody has seriously suggested that the parens patriae provision of the Hart-Scott Bill and H.R. 8532 or the other

improvements proposed would cure all the nation's ills. But that is hardly the standard by which the desirability of legislation can be judged. This legislation is needed because the nation and its citizens pay an unacceptably high price for antitrust violations and the parens patriae remedy would provide both a healthy deterrent and a means for compensating the victims. Certainly there is no evidence to support Mr. Handler's dire prediction of "calamitous effects to our economy that would result from their enactment," any more than there was evidence to support the similar predictions referred to in Northern Securities in 1904.

The suggestion that the members of the Assocation of the Bar of the City of New York should band together in the "noble cause" of lobbying against S. 1284 and H.R. 8532 -- and should solicit their clients to do the same -- is appalling. It reflects a confusion between self interest and public interest.[8/] We do not say that the parens patriae concept cannot be rationally debated. What we do suggest is that bipartisan legislation that has been carefully considered and approved by the House Judiciary Committee and is pending before the Senate Judiciary Committee, with the support of the Department of Justice and the Administration[9/] as well as the National Association of

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8/ See Marks, The Lawyer, The Public, and Professional Responsibility at 12-13 (American Bar Foundation 1972).

9/ See Statement of Thomas E. Kauper, Assistant Attorney General, Senate Hearings at 78-114 and supplemental (footnote continued)

of Attorneys General,[10/] deserves more responsible discussion than Mr. Handler has seen fit to give it.

David I. Shapiro[*/]

James vanR. Springer[*/]

9/ (footnote continued) letter of July 7, 1975, id. at 115-119; see also letter of September 25, 1975, to Chairman Peter W. Rodino, Jr., House Judiciary Committee.

10/ See Senate Hearings at 666.

*/ Members of the New York and District of Columbia Bars; partners in Dickstein, Shapiro & Morin.

Class Action Reports

A BI-MONTHLY OF PRIVATE ATTORNEY GENERAL AND PUBLIC INTEREST LAW

Editor, Beverly C. Moore, Jr., J.D. Harvard University, 1970

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IN CAMERA

Bills are sailing through both houses of Congress to legislate the manageability of massive consumer antitrust class actions. H.R. 8532, styled the "Antitrust Parens Patriae Act", provides that in any class action brought under §4 of the Clayton Act:

> [D]amages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit, without the necessity of separately proving the individual claim of, or amount of damages to, each person on whose behalf the suit was brought.

Having cleared the House Judiciary Committee by an overwhelming margin, this bill now awaits probable passage by the full House. A critical vote will soon be taken in the Senate Judiciary Committee on S. 1284, the companion bill. This Committee's relatively conservative cast promises a close vote, but our head counters predict that the bill will be reported out to the Senate floor, where only a filibuster could prevent enactment. Justice Department spokesmen for the Ford administration have voiced their support for this legislation, and Senate minority leader Hugh Scott (R-Pa.) is a co-sponsor. These factors plus the progress to date make the prospects bright that these bills will soon become law. If that happens, the concept of recovering aggregate, lump sum damages will revolutionize antitrust class actions and set an irresistible precedent for other areas of class action law and economic order.

New York state recently enacted a liberal class action statute which rejects the U.S. Supreme Court's *Eisen* requirement of personal notice to all identifiable class members. Though the New York legislation, which will be the subject of a forthcoming article, does not deal with such problems as manageability, it is nevertheless of great practical significance. The new statute replaces what has been one of the most restrictive state class action provisions in a state which happens to be a primary center of industry

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OPERATION MONEY BACK

BY
DAVID LEBEDOFF*

This is the Report of the Special Master appointed to administer the distribution of a $39.6 million settlement fund to consumers of allegedly price fixed antibiotics in six states, represented by their Attorneys General, who had opted out of an earlier $100 million nationwide settlement offer. The Report traces how the techniques of claim form pre-testing, blanket mailings, mass media publicity, and other educational efforts were coordinated to elicit nearly one million claims from ordinary consumers. Also described are the auditing and verification procedures employed which indicated a high degree of honesty among the claimants even though records of purchases were generally unavailable. Refund checks were ultimately mailed to 885,000 persons. The revolutionary character of this achievement may be appreciated through the fact that it surpasses by a factor of 14 the previous record for number of claimants in a class action damage distribution. The previous record holder, *In re Gypsum Cases,* involved claims by 70,000 businessmen who possessed detailed records of their transactions. In the earlier 43 state antibiotics settlement, covering 85% of the consumers allegedly overcharged, only 37,000 consumers received refunds, compared with 24 times more recipients in this settlement. Taking into account the smaller number of potential claimants in the six state settlement, it was 136 times more effective in compensating class members than the 43 state settlement.

Mr. Lebedoff's extraordinary success validates three fundamental propositions not widely accepted. First, very large numbers of consumers can be compensated for relatively small injuries even where the identities of class members are unknown at the outset and records documenting purchases are unavailable. Second, consumer class actions involving millions of class members are not unmanageable. This has previously been asserted. Now it has been demonstrated. The cost of administering the distribution of this money to individual consumers was only slightly greater than the interest earned on the settlement fund. Third, a fluid recovery establishing an aggregate class damage fund is a prerequisite to a successful distribution of damages to class members by a special master. For further analysis of "Operation Moneyback", as this refund effort was named, see 4 *C.A.R.* 228

History of the Broad Spectrum Antibiotics Litigation

For more than 22 years, the question of antitrust violations in the broad spectrum antibiotic industry has been before the Congress, the Federal Trade Commission and the federal courts. A short review of some of those proceedings is useful as a background to an understanding of the present settlement distribution.

Senate Investigation. In 1953 the Federal Trade Commission initiated an investigation into the business, conduct, practices, and management of corporations engaged in the production, sale, or distribution of antibiotic drugs. That investigation concluded in 1958 with the issuance of an *Economic Report on Antibiotics Manufacture.* In 1959 Senator Kefauver's Judiciary Subcommittee on Antitrust and Monopoly commenced an investigation into the ethical drug industry, including manufacturers of broad spectrum antibiotics. Public hearings, principally concerned with antibiotics, were held in 1960 before that Subcommittee, and in 1961 a report entitled *A Study of Administered Prices In The Drug Industry*[1] was transmitted to the full committee.

The Federal Trade Commission Proceeding. In July of 1958 the Federal Trade Commission issued a complaint charging American Cyanamid Company (Cyanamid), Charles Pfizer & Co., Inc. (Pfizer), Bristol-Myers Company (Bristol), Olin Mathieson Chemical Corporation (Squibb), and The Upjohn Company (Upjohn), the defendants in the instant cases, with unfair methods of competition and unfair acts and practices in the sale of antibiotics, all in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45). Evidence was taken in that proceeding (FTC Docket No. 7211) from January 1959 until February 1960. On October 3, 1961, the Hearing Examiner filed a

*Member, Minnesota Bar. Mailing address: 919 Midland Bank Bldg., Minneapolis, Minn. 55401. This Report has been lightly edited and thus differs somewhat in style, but not in substance, from the official Report filed with the Court.

[1] S. Rep. No. 448, 87th Cong., 1st Sess. (1961).

270 page initial decision completely exonerating all defendants from any violation of the Federal Trade Commission Act and ordering that the complaint be dismissed.

The matter was taken to the full Commission, and after extensive briefing and argument the Commission filed its opinion in August of 1963, which opinion disagreed in large part with that of the Hearing Examiner. The Commission found: (1) That Pfizer had obtained the Conover patent on tetracycline through misrepresentations and withholding of information from the Patent Office; (2) that Cyanamid's conduct before the Patent Office was the same as Pfizer's; (3) that it was not proven that a conspiracy existed between Pfizer and Cyanamid before the Patent Office, or any other conspiracy among the five defendants to exclude others; (4) that there was no misconduct before the Patent Office by Bristol, Squibb or Upjohn; and (5) that the five defendants had conspired to fix the prices of tetracycline.

The final order of the Commission, requiring compulsory licensing under the Conover, Duggar, and Niedercorn patents for tetracycline, was appealed by the defendants. In June of 1966 the United States Court of Appeals for the Sixth Circuit ruled that the participation of the Federal Trade Commission chairman in the proceedings had been a denial of due process to the defendants in view of his former position as counsel for the Kefauver Subcommittee.[2] The Court commented at length on the question of misconduct before the Patent Office and stated that, absent any testimony from Patent Examiner Lidoff concerning his actions and purposes, the order of the Commission on Patent Office misconduct was not supported by substantial evidence. The Court expressed no opinion as to whether there was substantial evidence to support the finding that there had been price fixing by the defendants. The matter was remanded to the Commission for consideration without participation by its chairman. The Court framed certain questions to be answered by Patent Examiner Lidoff.

On remand, the testimony of Patent Examiner Lidoff was taken before a new hearing examiner who was solely concerned with the question of misrepresentations to the Patent Office. In November 1966 the hearing examiner ruled that there was substantial evidence to support a finding of misconduct by Pfizer and Cyanamid before the Patent Office. The matter again went to the Commission for consideration without participation by its chairman. The Commission again concluded that Pfizer and Cyanamid were guilty of fraud before the Patent Office as a result of which the Conover Patent issued. As to price fixing, the remaining commissioners were equally divided, and, there being no majority on that matter, the charges of price fixing were dismissed. The final order of the Commission dealt only with the misconduct of Pfizer and Cyanamid before the Patent Office; no part of the order was directed against Bristol, Squibb or Upjohn; and as to them, the complaint was dismissed in its entirety. Pfizer and Cyanamid appealed the Commission's Order on Remand, and in September 1968 the Court ruled that the testimony of Examiner Lidoff supported the findings of misconduct before the Patent Office and justified the compulsory licensing order of the Commission.[3] The Court of Appeals did not undertake to pass upon the validity of the Conover patent. The Federal Trade Commission proceedings terminated.

The Criminal Proceedings. In 1961 an indictment was returned by a grand jury in the Southern District of New York (61 Cr. 772) naming Pfizer, Cyanamid, and Bristol. Squibb and Upjohn were named as co-conspirators. The indictment charged that the defendants, pursuant to a conspiracy, had misled the Patent Office to obtain a patent on tetracycline and had used patents to exclude competitors and to fix prices. Trial of the criminal action took place in November and December of 1966 before Judge Marvin Frankel sitting with a jury. The testimony on the criminal trial tracked in large part the evidence presented to the Federal Trade Commission. The jury returned a verdict of guilty on all counts.

In April 1970 the second Circuit reversed the judgments of conviction for errors in the Trial Court's charge to the jury.[4] The Circuit Court did not determine whether the evidence was sufficient to support the convictions, nor did it decide any of the questions of patent law presented to it. The Supreme Court affirmed by an equally divided vote,[5] and the criminal action was retried before Judge John Canella, sitting without a jury. On November 30, 1973 Judge Cannella found each defendant not guilty on all counts of the indictment. Thus ended the federal criminal proceedings.

The Civil Actions. Following return of the December 1967 jury verdict in the criminal proceedings, more than 140 civil actions were filed against the defendants claiming treble damages on account of alleged antitrust violations in the sale of broad spectrum antibiotic drugs. A large number of those actions, including the actions by the States of California, Kansas, Hawaii, Oregon, Utah and Washington, were brought as class actions. Under date of February 6, 1969 (later modified under date of May 9, 1969), the defendants made a written offer of $100,000,000 in settlement of all claims of the fifty states, counties, cities, and their political subdivisions and agencies, and any other government entities (excluding the Federal Government) arising out of their purchases or payments for broad spectrum antibiotics, as well as the claims of wholesalers, retailers, and individual consumers arising out of such purchases, including the claims of states as parens patriae on behalf of their citizens, or on behalf of classes including

[2] 363 F.2d 757 (6th Cir. 1966).

[3] 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

[4] 426 F.2d 32 (2d Cir. 1970).

[5] 404 U.S. 548 (1971).

the state as a consumer and all other consumers in the state.

The offer of settlement, as modified, was accepted in principle by most of the plaintiffs, and on May 26, 1969 the Honorable Inzer B. Wyatt, United States District Judge for the Southern District of New York, to whom all of the broad spectrum antibiotic litigation had been assigned, entered an order providing that any of the plaintiff states could, by notice, exclude itself and the classes which it proposed to represent from the proposed settlement. The States of California,[6] Kansas, Hawaii, Oregon, Utah, and Washington, as well as North Carolina, elected not to accept the offer. Following extensive briefing and hearings on the matter, Judge Wyatt, in June of 1970, issued an order approving the settlement and adopting the so-called "Alabama Plan" as the method for distributing the portion of the offered $100,000,000 going to those plaintiffs accepting the offer.

Had the six states involved in these cases elected to settle their actions and to partake in the "Alabama Plan" distribution, the following amounts would have been allocated to them:

California (including Los Angeles and San Francisco	$10,511,500
Hawaii	267,300
Kansas	1,392,000
Oregon	791,900
Utah	339,300
Washington	1,549,900
Total	14,851,600

The foregoing amounts were subject to a holdback of 20% of the portions allocable to institutional purchases and to individual consumers, which holdback sums were placed in escrow to assure reimbursement for any amounts which the defendants might be required to pay to any Blue Cross Association or other insurer which may have indemnified the settling entity with respect to a portion of the payment so allocated.

By way of comparison, the total amounts of the actual settlements in the six cases now before this Court, including interest to be paid by the defendants as of the date the amounts are deposited in the registry of the court, are as follows:

California (Including Los Angeles and San Francisco)	$28,140,000
Hawaii	351,000
Kansas	3,570,000
Oregon	2,177,000
Utah	1,143,000
Washington	4,235,000
Total	39,616,000

The said settlement amounts are not subject to any holdback such as was applied to the "Alabama Plan" distribution. The entire increase has been allocated to individual consumers within the states.

At the time that Judge Wyatt approved the $100,000,000 offer, it was necessary for him to consider and to remark upon the fact that certain of the plaintiffs, including these states, had chosen not to participate in that settlement:

> . . .A careful study of those records leads to a conclusion that the chances of recovery in any of these cases are no better than 50-50 and probably should more realistically be called slight. (314 F. Supp. at 741). . . . Not only is it uncertain that any plaintiff can secure a jury verdict. It is also uncertain whether judges or justices will find the evidence sufficient to support any such verdict. . . . There is no direct evidence of any price fixing or of any conspiracy. Such evidence as there is must come almost entirely from the defendants themselves and, as the Court of Appeals noted, "the facts may be said to Be virtually undisputed". Before the first Hearing Examiner and at the criminal trial, executives of defendants testified. They denied the existence of any conspiracy or any price fixing. Even if a jury chose to disbelieve such testimony, it is at least questionable whether there is other evidence sufficient to support a verdict for a plaintiff. (314 F. Supp. at 742-743). . . .
>
> At the same time, it has to be considered that California, six other states, two counties in California, and Kansas City, Missouri, have rejected the offered settlement. These rejecting plaintiffs are represented by able and experienced counsel whose opinions about the proposed compromise must also be taken seriously into account. Even among the best lawyers, however, opinions may, and often do, differ. It is felt that in this instance a misplaced optimism about a highly problematical result has led to the exercise of questionable judgment. The rejection of the settlement occurred, of course, before the criminal convictions of three of the defendants had been reversed by the Court of Appeals. It must also be recognized that ultimately a larger recovery may possibly be obtained by the rejecting plaintiffs than the amount presently available in settlement. However, the chances of this occurring do not

[6] The City and County of San Francisco and the County of Los Angeles initially accepted defendants' offer on behalf of their public hospitals and the citizens residing within the geographic boundaries of these entities. One of the reasons for the Los Angeles and San Francisco action was the possibility that these entities would receive any leftover money from a distribution to consumers.

The State of California opposed the action taken by San Francisco and Los Angeles on the ground that the Attorney General was the only proper Rule 23 class representative for the citizens of California and that political subdivisions could not separately settle on behalf of some citizens while the remainder of the citizens of the State continued to litigate. The question was on appeal before the Second Circuit when a compromise was reached whereby San Francisco and Los Angeles agreed to withdraw from the settlement and permit the Attorney General to litigate on behalf of all California citizens. San Francisco and Los Angeles themselves would continue to litigate on account of their institutional purchases. The State on its part agreed to dismiss its appeal and to pay San Francisco and Los Angeles $103,000 and $710,000, respectively, at the conclusion of the litigation. The terms of this settlement were disclosed to all California citizens in the class action notice dated October 31, 1973.

seem to be very great. . . . It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced. Merely by way of example, two instances in this Court may be cited where offers of settlement were rejected by some plaintiffs and were disapproved by this Court. The trial in each case then resulted unfavorably for plaintiffs; in one case they recovered nothing and in the other way they recovered less than the amount which had been offered in settlement. (314 F. Supp. at 743).

Procedural History Of These Cases. On November 19, 1968 the Judicial Panel on Multidistrict Litigation transferred all of the broad spectrum antibiotic cases filed throughout the United States to the Southern District of New York, where they were consolidated for coordinated pretrial discovery before Judge Wyatt,[7] At the time of that order all of the litigation was in a non-settled posture.

Following the election of these six states not to participate in the $100,000,000 settlement, Judge Wyatt, by Pretrial Order No. 1 dated February 24, 1970, divided the non-settling cases into four categories: (1) city, county, state, and United States Government cases (CCS cases); (2) farm cases; (3) miscellaneous cases; and (4) hospital cases. The counsel of record for each category of cases were designated as a Committee of Counsel. Each Committee of Counsel selected five of its number to participate on a Plaintiffs' National Steering Committe (PNSC) which was charged with the coordination of the plaintiffs' discovery efforts. Judge Wyatt established a document depository at 55 Liberty Street, New York City, to be used for defendants' documents discovered by plaintiffs.

In February 1970 the plaintiffs in the CCS cases moved to have the Court establish those cases as class actions on behalf of the institutions and consumers within their boundaries. These motions were argued in May, but in November of 1970, because of the enormous pressures which the administration of the various settlements then pending had placed upon Judge Wyatt, the nonsettling cases were transferred by the Judicial Panel to the Honorable Miles W. Lord, who was designated to sit in the Southern District of New York.

On April 13, 1971, by Class Action Order No. 71-11 filed separately in each state action, the Court further determined that the nonsettling state actions were to be maintained as class actions pursuant to Rule 23, with the named party as representative party on behalf of a class comprised of purchasers within the state who during the period 1954 through 1966 purchased or paid for broad spectrum antibiotic products for human consumption from public or private hospitals or from pharmacies, drug stores, or other retail outlets, including the state on account of payments made for the benefit of recipients of welfare programs. Class Action Order No. 71-11 directed that notice be given to the members of the consumer class. Pursuant thereto, in May 1971 notice was provided by mail to each household in the nonsettling states advising the residents of the pendency of a class action on behalf of consumers within the state and that they would be included in the action unless they filed a timely written election to be excluded.

Following the establishment of the PNSC and the creation by it of a Discovery Subcommittee, the parties engaged in extensive discovery throughout the years 1971, 1972, and 1973. Extensive sets of interrogatories had been promulgated by all parties in 1970. Early in 1971 a number of meetings were held between the attorneys for the defendants and the PNSC Discovery Subcommittee with regard to those interrogatories. Agreements were reached and motions argued to the Court, as a result of which the parties provided one another with extensive information. Commencing in early 1971 motions for the production of documents were propounded and argued to the Court. Pursuant thereto, many hundreds of thousands of documents were deposited by the defendants in the document depository in New York City. The plaintiffs reviewed the material placed in the depository, copied nearly a quarter of a million documents which they felt to be of use, and transferred those documents to the plaintiffs' depository for further review. Throughout the balance of 1971 and the year 1972, the plaintiffs read, analyzed, and categorized the documents so produced. Concurrently, members of the plaintiffs' Discovery Commitee began the process of summarizing the testimony and exhibits which had been offered and/or received in evidence in the prior FTC and criminal proceedings. The relevant testimony in those two cases exceeds 20,000 pages. In addition, numerous depositions which had been taken in infringement actions relating to broad spectrum antibiotics were reviewed.

Prior to its case being transferred to the Southern District of New York in 1968 by the Judicial Panel, the State of California retained a team of economic and statistical experts to prepare an economic study consisting of a theory and measure of damages for institutional, welfare, and consumer purchases and a statistical study to determine the amount of institutional, welfare, and consumer purchases of the relevant drugs in California. In June 1971 California filed its first economic brief. Thereafter the Court appointed an economic and statistical expert to review the California materials and defendants' responses and to mediate informal meetings between the California and defendant statistical experts for the purpose of auditing the California statistical methodology. Meanwhile the other states also retained an expert economist and a statistician to perform similar studies for them and, at the request of the Court, after analysis adopted many of the procedures followed by the California experts and much of the material of national significance which had been prepared by them. During 1971 and 1972 the Court's experts also conducted informal conferences with the various economists that resulted in an exchange of views and clarification of the economic and damage issues amongst the parties.

[7] 295 F. Supp. 1402 (J.P.M.L. 1968).

California consequently filed a revised damage study, and the defendants filed extensive responses thereto.

Following the process of document review and categorization referred to above, from February through July of 1973 the plaintiffs conducted throughout the United States more than 130 depositions of defendants' personnel and other persons having relevant knowledge concerning the matters in litigation. Prior to and concurrent with the plaintiffs' deposition program, the defendants had taken in excess of 200 depositions of plaintiffs' personnel and others, including retail pharmacists in California and Minneapolis. While engaged in this task of pretrial discovery and preparation, the plaintiffs were required to appear and defend against requests for extraordinary writs filed by the defendants on four separate occasions in two of the United States circuit courts.[8]

In May 1973 the nonsettling states moved the Court for an order setting the cases for trial at the earliest possible date. Plaintiffs' Trial Brief and Appendices thereto, which exceed 600 pages and which spell out in great detail the contentions of the plaintiffs, supported in each instance by appropriate reference to depositions, documents, prior governmental proceedings and exhibits thereto, were served and filed on August 17, 1973, together with Requests for Admissions of the authenticity of certain documents and the truth of certain facts. Concurrently plaintiffs filed designations of the portions of the testimony and exhibits from the FTC and criminal proceedings which they intended to use at trial. From November 1972 until August 1973 the parties attended many pretrial hearings which dealt with legal contentions and administrative matters presented to the Court for resolution prior to the trial. In June 1973 the defendants served the plaintiffs with notices of a number of depositions which they intended to take throughout the world. In response plaintiffs filed a statement of the extent to which they intended to rely on foreign matters in support of their claims. The defendants continued to insist on the necessity of engaging in worldwide depositions, however, and those took place in the late Summer of 1973.

On August 27, 1973, following argument on the matter, the Court determined that the CCS cases would commence trial no later than October 10, 1973. Since March 1971 settlement negotiations had occurred from time to time between defendants and various plaintiffs. In early September 1973, following the Court's ruling that trial would commence on October 10, counsel for the states of Washington and Kansas met with certain counsel for the defendants to explore the possibilities of settlement of these actions. An agreement in principle was reached and after further negotiations a settlement by the States of Washington, Kansas, Oregon, Hawaii, and Utah was reached with all defendants. Separate negotiations with the State of California continued and a settlement in the California case was reached on October 3, 1974. On October 17, 1973, Memoranda of Agreement were signed by counsel for all of the parties in each of the settling states.

Thereafter, on October 31, 1973, this Court entered Class Action Orders No. 73-36 in each of the pending CCS cases, directing that notices be mailed to each of the institutions which had made a claim in these actions and to the individual members of the consumer classes in each state, advising them that a hearing would be held in Minneapolis on February 13, 1974 to determine the fairness and adequacy of the proposed settlements. Pursuant to Class Action Order No. 73-36, written notices were mailed in each state to each individual household within the state, advising its members of the hearing.

As stated above, in addition to the states of California, Hawaii, Kansas, Oregon, Utah and Washington, the State of North Carolina also rejected the proposed $100,000,000 offer of settlement made in February 1969, and that case was transferred to the Honorable Miles W. Lord along with the others. Subsequently, in the spring of 1973, pursuant to a request by counsel for the State of North Carolina, that action was transferred to the Eastern District of North Carolina for all purposes. The matter was tried before the Honorable Franklin T. Dupree, Jr. of the Eastern District of North Carolina, sitting without a jury, during the summer, fall, and winter of 1973. In the summer of 1974 Judge Dupree entered judgment for the defendants on all counts and dismissed the North Carolina action with prejudice.

On March 21, 1974, following the hearing as to the adequacy of the settlements, the court entered its memorandum approving the settlements in each of the six states and signed orders and judgments dismissing the actions with prejudice. On July 17, 1974, pursuant to the terms of said judgments, the defendants paid the settlement amount to an escrow agent appointed by the court.

Administration and Distribution of Settlement Fund

At the time of this settlement, it had not been established by example that a fair distribution to members of an "opt-out" consumer class was "manageable." There was an absence of conclusive precedent, an abundance of practical difficulty. No techniques had been established to permit very large numbers of consumers to apply for refunds based on actual purchases during a time period beginning twenty years prior to the settlement. In the intervening years a number of factors – death, the large

[8] These procedures were: Pfizer, Inc. v. Lord, 447 F.2d 122 (2d Cir. 1971) (Petition for a Writ of Mandamus Re: Court's Order Transferring All Cases to the District of Minnesota Under 28 U.S.C. §1404(a)); Pfizer, Inc. v. Lord, 449 F.2d 119 (2d Cir. 1971) (Petition for a Writ of Mandamus Re: Court's Order Establishing Consumer Classes in the Litigating States); Pfizer, Inc. v. Lord, 456 F.2d 532 (8th Cir. 1972) (Petition for a Writ of Mandamus Directing the Honorable Miles W. Lord to Recuse Himself from Presiding over the Litigating Actions); Pfizer, Inc. v. Lord, 456 F.2d 545 (8th Cir. 1972) (Petition for a Writ of Mandamus Directing the Trial Court to Vacate a Discovery Order Relating to Defendants' Claim of Privilege as to Certain Documents).

movement of populations, changes of name through marriage or divorce – had increased the hazards of locating precisely the members of this class. Given these factors, it is understandable that one of the most gifted and experienced of defense counsel felt moved to speculate to the Court at the final settlement hearing that perhaps no more than 30 to 40 thousand consumers in the largest state involved would ever receive refunds for their tetracycline purchases under this settlement.

At the settlement hearing, the subject of manageability was specifically addressed by the parties and the Court. Counsel for the State of Washington expressed the view that:

> It will be possible to administer the settlements and to distribute those moneys to those people in a way that should demonstrate that consumer class actions in the United States are viable and that they should be protected.

He went on to state that:

> I think that the administration of these settlements with the use of modern computer techniques with the help of some public relations people that can teach lawyers how to talk to consumers rather than to judges, and to explain to them in simple terms, will allow us to distribute these funds without depleting them in the course of the administration.

Counsel for the State of California, speaking in the vernacular, asserted that:

> It is a cop-out for a trial judge to refuse to use the tools available to him and then to say that a class action is unmanageable when in fact he could use those tools to make any class action manageable.

Counsel for defendants suggested that a distribution of magnitude was not manageable:

> If, for example, California can come in to court against us with the weight of possibly ten million purchasers, and in fact it turns out that the active interested members of the class consist of thirty or forty thousand people, it seems to me that [a dispassionate author recording these events] ought to consider the question of public policy of whether the scales of the adversary contest have not been unfairly weighted on the side of the plaintiff in that sort of suit. The real hard question between us, I think, in these negotiations and the question that kept at least this defense counsel awake at night, was not trying to assess the odds on liability, that lawyers do all the time, but this great unknown mass of consumers.

The court expressed its own views on the matter:

> It just seems to me that the word unmanageability should never be used as a definition of any situation until a person sits down to define just what the problems are. Looks to me it's like an easy way for a lazy judge to get out of handling a complicated case, is all unmanageability means.

He concluded, "We will try this one. I think it will work."

The Court maintained that a distribution on this scale was manageable and committed itself fully to establishing that in fact. By Administrative Order 74-40, Judge Lord appointed David Lebedoff as Special Master charged with advising the Court in the administration and distribution of settlement funds, including the Consumers Settlement Fund. The Court instructed the Special Master to make every reasonable effort to reach the members of the consumer class and to make clear to them their right to claim a refund.

Beginning in February 1974, meetings were held between Special Master Lebedoff and counsel for the six plaintiff states. No Committee of Counsel was ever formally constituted, but the plaintiff states' counsel, both public and private, exhibited from the outset and throughout the duration of the distribution the fullest possible cooperation with and assistance to the Court, working under the direction of the Special Master in all aspects of planning and execution of the distribution. In addition, the most skilled and resourceful assistance was at all times extended by Special Master Thomas Bartsh, without whose exceptional intelligence and wealth of experience this distribution would not have been possible.

Goals. It was unanimously agreed that the central goals of the distribution included, first, that every member of the consumer class be notified in a clear and comprehensible way of the right to file a claim for refund. This included every person who had purchased the relevant broad spectrum antibiotic drugs at retail between January 1, 1954 and December 31, 1966 in the states of California, Washington, Oregon, Kansas, Utah and Hawaii (excluding the City and County of Honolulu). It was not possible to obtain or collate a definitive list of such consumers. Nor was it possible to calculate precisely the numerical size of this class or its exact percentage of the six state population during the relevant period.

The only way to ensure that each consumer was notified was to extend notification to each household within the plaintiff states. Further, such notification could not be limited to publication, even in journals of the widest circulation. It would be necessary to mail to each household in each of the states a claim form in which the rights of consumers under the settlement were explained accurately and in such a manner as to be readily comprehensible to individuals of the most diverse backgrounds and levels of education. It was concluded that no publication or publicity in itself could substitute for the immediacy or range of such mailed notification to the total population. (But it was also seen that a program of publicity could help to increase the response to the mailed claim forms.)

It was recognized that a certain but undeterminable number of consumers who had resided in the six plaintiff states during all or part of the 14-year period covered by the settlement had subsequently left those states and therefore would not be reached by the mailed notification. In the search for these consumers, it was not economically feasible to mail notification to every household in the

country. This group would have to be reached through a program of publicity that was national in scope.

Second, each consumer's refund should be in direct relation to the size of his purchases. The major obstacle to this goal would be the difficulty of producing proof of such purchases after the passage of so many years from the time they were made. To ignore this difficulty would be to disserve the members of the class. But its existence posed a problem: To pay out an equal amount to each consumer would avoid the necessity of retrieving exact proof of purchases. It would enable the largest number of consumers to participate in the refund. But it would frustrate the basic goal of reasonably relating each refund to the quantity of purchases involved. This would be particularly unfair to those consumers whose purchases of broad spectrum antibiotics had been atypically heavy. Somehow, the goals of broad response and equitable refund would have to be reconciled.

Third, every reasonable effort should be made to prevent false or exaggerated claims for refund. Since it was unreasonable to expect all consumers to have retained proof of purchases made twenty years earlier, consumer estimates based partly on memory would be considered by the Court. It was important that this allowance not be abused. A system of checks and safeguards had to be established to ensure and verify that consumers did not, through mistake or fraud, overstate the amount of their antibiotic purchases.

Fourth, the costs of administering the distribution should be carefully controlled. The settlement agreement provided the sum of 20 cents per capita (for each resident of the six plaintiff states) to be applied toward administration of the settlement fund. The unused portion of this allocation would be distributed to the consumers along with the bulk of the settlement fund. Quite simply, the less money that was spent on administration, the more there would be to return to consumers. With that in mind, every effort would be made to administer the fund at a cost below the twenty cent per capita figure agreed upon in the settlement. It was agreed that if distributions of this scale are to be considered "manageable," they must be administered at a cost that does not unreasonably diminish the corpus of the settlement fund.

Fifth, despite the magnitude of the project, the right of each individual consumer to procedural due process – to clarity, to timely notice, to appeals procedures must be maintained.

Claim Form "A". With these goals in mind, work began on the composition of a claim form to be mailed to each of the 10,700,000 households in the six states. Throughout February and March of 1974, numerous drafts of the form were prepared and discussed by the Special Master and the plaintiff counsel. The basic problem soon became apparent: how to convey and request a good deal of information in a form that was simple and comprehensible to the layman. Common sense dictated that a claim form sent to such a huge population could not be patterned exclusively on claim forms sent to businesses or other large purchasers in previous class action settlements. The typical claimant in this distribution would not have at his disposal the services of a lawyer or an accountant or a secretary. The claim form would have to accommodate that reality. On the other hand, there was a limit to the amount of substance that responsibly could be omitted from the form. To what extent could detail be sacrificed for simplicity?

This question was particularly urgent with regard to large claims. While very large claims might not be numerous, they would probably account for a significant share of the distribution dollars. It was felt that the larger the claim, the higher should be the burden of proof required to support it. But requests for extensive purchase information might have a discouraging effect on the much larger number of potential small claimants, whose claims might not justify the expense and effort of collating supportive materials.

This problem was resolved by the concept of a two-part claim form. It would be mailed to 10,700,000 households, i.e., to every household in the settlement area. The first section, Part A, would set forth as simply as possible the essential facts: the nature of the settlement, the drugs involved, the information required, the relevant time period. Part A did not require claimants to list specific purchases. It asked them to state the number of years in which each member of the claimant household used broad spectrum antibiotic drugs.

Part B applied to those claimants who possessed actual records of their drug purchases. Presumably, these would be the larger claimants. They were required to state specific drug purchases on a year-by-year basis, as well as to list the disease for which the drugs were purchased. They were also asked to report the names of the prescribing physician(s) and their pharmacies. It was felt that Part A was analogous to the "short form" of the Internal Revenue Service. It would permit the typical purchaser to apply for a refund even if he no longer possessed specific proof of purchase.

Once this basic decision had been made as to the nature of the claim form, related functions could proceed. It would not be possible to process the anticipated large number of returns without the assistance of a data processing firm, preferably one with experience in an analogous consumer refund program. It was advisable to engage such a firm as soon as possible, to be able to draw upon its expertise and to anticipate its processing requirements when composing exactly the claim form.

Negotiations were carried on between the Special Master and representatives of the San Francisco office of Computer Sciences Corporation (C.S.C.), which had at that time just completed the processing of claim forms in *In re Gypsum Cases*.[9] This had involved the processing of 69,039 claim forms, many accompanied by extensive and complex documentation, perhaps the largest consumer class action

[9] ___ F. Supp. ___ (N.D. Cal. 1974).

distribution up until that time. The recent experience of C.S.C. in the *Gypsum* case, the capacity of the firm to draw upon the services of in-house personnel experienced in the various aspects of our anticipated project, and the general impression of the C.S.C. capacity as evidenced throughout our negotiations all suggested that the data processing firm should be contractually retained by the Court.

The Special Master and the counsel working under his direction soon recognized that data processing is a highly specialized and complicated field, with a vast technical vocabulary of its own. For maximum effectiveness, an interpreter was required. It was felt necessary for the Court to retain its own data processing expert, to assist the Special Master in all his dealings with the data processing firm, to help the Court to anticipate its needs in this project, to articulate those needs with technical precision, to assist in evaluating the programs and processes to be performed by the data processing firm, and to carefully examine all costs connected with such services. To execute the critical function of liaison between the Court and the data processing firm, the Court retained contractually the services of Mr. Ivan Reinhart, President and chief executive officer of Automated Financial Service, a Minnesota corporation operating as a data processing service bureau. Mr. Reinhart is broadly experienced in customized system analysis and programming functions, and in general consulting activities. He is particularly experienced in processing credit and collection data, through which work he is accustomed to the problems and techniques of large-scale mailings.

From the point at which he was retained by the Court in March 1974, Mr. Reinhart participated in the negotiations with C.S.C. At his suggestion certain revisions were agreed to by all parties, and a contract was eventually signed between the Special Master, representing the Court, and C.S.C., in which the data processing functions of this distribution were described and assumed by C.S.C. (See Exhibit 1).[10]

From his retention by the Court until the present, Mr. Reinhart has provided invaluable assistance. Throughout the distribution, he was intimately involved with the planning and execution of all processing functions. His expertise, diligence, and exceptional intelligence were of immense aid to the Court and were, in the opinion of the Special Master, the source of very great economies to the consumer class, in terms of both time and money. It is strongly recommended to those who attempt future distributions comparable to that described herein that the post of liaison between the distributors and the data processing personnel be established at the outset.

Intense work over a period of many weeks had resulted in general agreement over the content of the claim form. Expressing that content was another matter. The problem was not knowing what to say, but knowing precisely how to say it. The form had to be simple and comprehensible to all who received it. As draft followed draft, it became apparent that real clarity could be achieved not only by expression but through lay-out design. It was necessary to seek the assistance of professionals in this area. Accordingly, the advertising agency of Chuck Ruhr Associates was engaged by the Court to assist in the construction of the claim form and to develop a program to increase its acceptability.

This latter function deserves some emphasis. The claim form was to be mailed at the third class bulk rate, the lowest rate available to us for that purpose. Each would be addressed simply to "Residential Patron/Local". Since the claim form was to be a self-mailing piece, addressed only in the most generic fashion, the possibility existed that it would be mistaken by some for an advertising or other promotional piece and discarded without having been read. It would be necessary to have a carefully coordinated program of publicity to precede the mailing of the forms, so that consumers would be aware of the refund program and would be expecting the mailing.

Such a publicity program over the six state area, with its great distances and numerous population centers, could be most effective through reliance on radio and television. But the costs of commercial advertising through such media were prohibitive. They would have depleted the settlement fund. The only economically responsible way of employing the media to further our distribution was to persuade the thousands of individual radio and television stations in the six state area to make available to us a significant share of the public service time required by the Federal Communications Commission. Under this F.C.C. provision, public service messages that are supplied to the stations can be run without charge to the group that supplies them. A very large number of organizations seek to avail themselves of this provision, and the competition for selection is severe. For one organization to have its message played frequently and at no cost by thousands of stations across a six state area and within a specific time period requires an extensive professional effort.

This is a major reason that the Ruhr agency was selected. It had worked with the Minnesota Crime Watch program since the inception of that program in July 1973. As part of its work on behalf of that program, the agency had developed a program of utilizing to the fullest possible extent the availability of public service broadcast time, both on radio and television. Its success in this area suggested that the same function could be performed for us. In addition, the Ruhr agency had a well known record of success in developing advertising for statewide political campaigns on behalf of candidates for both major political parties. This experience, which involves using the media to reach a very large number of persons within a constricted period of time, was also applicable to our needs.

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[10] All Exhibits are available from the C.A.R. Pleadings Library. A complete listing of CAR Order Nos. appears at the end of this article.

After much consultation, the Ruhr agency designed a claim form to meet our requirements. They then subjected that form to market testing. If there was a single step in the progress of this distribution that should be singled out as most helpful to the achievement of the final result, it was the market testing of the claim form. Such testing should become an essential function of all future distributions of this nature. It is the opinion of the Special Master that the information gained through this market research permitted improvements of the claim form that were ultimately responsible for eliciting a much wider response than would have occurred absent the market research. It is impossible to estimate exactly the quantitative effect of these improvements, but they may well have resulted in several hundred thousand more claims being filed than otherwise would have been the case.

The Ruhr agency subcontracted with Stephen Plasman and Associates, Minneapolis, to conduct the market research. Under the direction of this firm, the most advanced draft of the claim form was submitted to a panel of housewives, whose reactions were carefully recorded. (See Exhibit 2). The housewives selected were from Minnesota, but in every other respect they were representative of the individuals who would in fact be receiving the form.

Several major revisions were made in the claim form as a result of this pre-testing. First, it was found that while the test group members often lacked documentation and, in some instances, memory of the specific prescription drugs that they had bought from 1954 through 1966, they seemed to have excellent recall of the diseases suffered by members of their families during this period. In enabling them to accurately complete the claim form, it would be helpful to emphasize on the form itself the illnesses for which broad spectrum antibiotic drugs were most commonly used during the relevant time period.

Second, many in the test group indicated that they would not fill out the form without having an approximate idea of how large their refund would be. Without that information, the whole project seemed to them too imprecise to be taken seriously. It was necessary to supply some rough estimate of the possible rate of return. So the form was amended to include the fact that the average broad spectrum antibiotic charge during the period was $5.00 per prescription, and that the alleged overcharge was 29 cents for each dollar spent on those prescription drugs. The 29 cent figure was not expressed in terms of a guaranteed return; the claim form stated that "Your actual refund will depend in part on how many persons complete the attached form." But providing an alleged overcharge figure afforded a useful tool to enable claimants to more accurately estimate their claims.[11]

[11] The 29 cent figure is the quantity-weighted average percentage of damages for the thirteen year period estimated by the plaintiff California Economic Brief.

Third, while the phrase "broad spectrum antibiotic drugs" had little meaning to the test group, the members of the group did have a good memory of the actual brand names for such drugs. Those names were added to the front page of the claim form, printed in large type and surrounded by a heavy border for emphasis.

Fourth, and most significant, was the effect of market research on the concept of a two-part claim form. The testing demonstrated that the concept simply would not work. Each half of the form worked against the effectiveness of the other. The claimants who should have filled out Part A were intimidated by the demands of Part B and felt that its requirements for proof applied to them as well. The Part B claimants were discouraged from assembling proof of purchases when they saw that this requirement could be avoided by staying with Part A, even at the possible sacrifice of being able to justify the refund they were claiming. Because Parts A and B were mutually counterproductive with regard to the intended goal of each, they could not be retained on the same claim form. The solution was to have two separate mailings. Every household would receive a modified version of Part A (hereinafter referred to as Claim Form A, reproduced on the next three pages). It would be clearly stated on this claim form that those claimants making a total household claim in excess of $150 might be asked to submit documentation to the Court at a later date. Through a second mailing after all Claim Forms A had been received, each claimant for purchases in excess of $150 would receive a modified version of Part B (hereinafter referred to as Claim Form B). For these purposes, the sum of $150 was reasonable. It was based on an estimate of slightly more than two prescriptions per household per year during the thirteen year period.

After these changes had been made, the claim forms were again subjected to market testing by a consumer panel. The test was encouraging. (See Exhibit 4). The earlier difficulties had been largely corrected through the alterations described above. The goals of clarity and elicitation of a wide response seemed finally to have been met.

As arrangements for printing and mailing the claim forms were being made, it was necessary to establish a center to receive and process the claim forms. To house this Claims Processing Center 5,899 square feet of space was rented in a San Francisco office building only a few blocks from the C.S.C. office in that city. The Claims Processing Center was a convenient headquarters for meetings relating to the distribution: counsel for the states of Utah and Hawaii was located in San Francisco, as were the members of the staff of the California Attorney General working on this distribution. Representatives of the Attorneys General of Washington and Oregon were able to travel to San Francisco at short notice. The relative centrality of the Claims Processing Center permitted frequent meetings and facilitated the coordinated work effort.

CASH REFUND MESSAGE

ATENCION — MENSAJE DE REEMBOLSO: SI USTED COMPRO CIERTAS DROGAS ANTIBIOTICAS ENTRE 1954 Y 1966 PUEDE TENER DERECHO A QUE LE DEVUELVAN DINERO. SIN COSTO A USTED, SIMPLEMENTE LLAME AL TELEFONO (800) 648-3700 Y UN MENSAJE EN ESPANOL LE HARA SABER EN DONDE PUEDE RECOJER IN FORMULARIO MUY SENCILLO, PERO INDISPENSABLE PARA EL REEMBOLSO DEL DINERO. HAY $20 MILLONES DE DOLARES DISPONIBLES.

If you lived in any of these states at any time during the period 1954 through 1966.

California, Hawaii (with the exception of the city and county of Honolulu), Kansas, Oregon, Utah, or Washington.

AND

Purchased any of these antibiotic drugs.

Achrocidin, Achrocortril, Achromycin, Achrostatin, Aureomycin, Azotrex, Bristacycline, Comycin, Declomycin, Declostatin, Mysteclin, Panalba, Panmycin, Polycycline, Signebon, Signemycin, Steclin, Sumycin, Terrabon, Terracortril, Terracydin, Terramycin, Terrastatin, Tetrabon, Tetracydin, Tetracyn, Tetrastatin, Tetrex, Urobiotic, Velacycline, or any combinations or derivatives of the above.

SPECIAL NOTE: The following four drugs are not eligible for refund: Penicillin, Ampicillin, Streptomycin, and Polycillin.

You will receive a cash refund if you complete the simple form inside. You do not need documented proof of drug purchases.

(If your drugs were paid for by any welfare agency you are not eligible.)

Attorneys General settle case against drug manufacturers.

Cash refunds are a result of a court approved settlement obtained in U.S. District Court by the Attorneys General of California, Hawaii, Kansas, Oregon, Utah and Washington, against certain drug manufacturers for alleged overcharges to consumers during the years 1954 through 1966.

These prescription drugs were commonly used to treat flu, bronchitis, ear infections, respiratory infections, acute acne, cystic fibrosis and many other infections and physical ailments.

More than $20 million dollars is available to be refunded.

More than $20 million dollars is available to be distributed to the residents of the above six states, with the exception of the city and county of Honolulu, who qualify and fill out the simple form on the opposite page.

If you qualify and fill out the form *you will receive a cash refund.*

How much money will you receive?

The claimed average overcharge was 29¢ for each dollar that you spent on these prescription drugs. The average cost for each prescription or refill was $5. If you apply these figures to your total number of prescriptions during the 13 year period, you will have an estimate of how large your refund could be.

Your actual refund will depend in part on how many persons complete the attached form.

The alleged overcharges would have been made by the manufacturers to the retailers. Consequently, you as a consumer would have been overcharged no matter where you purchased your drugs at retail.

No documented proof of purchase necessary if your total purchases were $150 or less.

It is not necessary to have documentary proof of drug purchases . . .

If the total purchases for you and all your dependents were $150 or less.

Simply complete, sign and return the attached form, and you will receive a refund.

Refold the form so the "Claims Processing Center" address appears on the outside.

If you claim for purchases in excess of $150 you may be asked to supply documentation of purchase. Please do not send any separate documentation at this time.

(Be sure to complete the attached form: *Everyone* making a claim of any size *must complete the attached form.)*

Special note.

If you lived in any of the qualifying states at any time during 1954 through 1966 and purchased any of the broad spectrum antibiotic drugs mentioned, you are entitled to a cash refund. If you have a justified claim, you should make it.

The settlement dollars have been deposited with the court by the drug companies involved and all meritorious claims will be paid.

Miles W. Lord

MILES W. LORD
U.S. DISTRICT JUDGE

Evelle J. Younger

EVELLE J. YOUNGER
ATTORNEY GENERAL
STATE OF CALIFORNIA

DIRECTIONS FOR CLAIM FORM TO BE FILLED IN BY ALL CLAIMANTS

The qualifying states are:

California (CA) Hawaii (HI) Kansas (KS) Oregon (OR) Utah (UT) Washington (WA)
Please use those abbreviations for the state when completing the form below.

TO BE FILLED IN BY CLAIMANT, WHO MUST ALSO SIGN AT THE BOTTOM OF PAGE.

BEGIN WITH FIRST SQUARE AT LEFT. USE ONLY ONE SQUARE PER LETTER OR NUMBER.

PRINT YOUR NAME last name first name middle initial

PRINT YOUR ADDRESS street number street name apt number

PRINT YOUR CITY, STATE AND ZIP CODE city state zip code

SOCIAL SECURITY NUMBER – – none

TELEPHONE NUMBER area code telephone number none

DRIVERS LICENSE drivers license number none

INSTRUCTIONS: List information below about yourself and dependents who used broad spectrum antibiotic drugs during 1954 through 1966 while living in a qualifying state. Dependents are any persons for whom you were financially responsible, examples could be a spouse, child or parents.
For each person who used broad spectrum antibiotic drugs fill in the required information.
Complete as much of the form as you can. If you are unsure of specific information, use approximate figures that are as accurate as possible.

	a. relationship to you	b. present name	c. age today if deceased print XX	d. number of years lived in qualifying state 1954 through 1966	e. approximate number of prescriptions bought using any of the drugs listed on page one.	f. approximate amount spent for those drugs. Round off to nearest dollar.
1.	myself					.00
2.						.00
3.						.00
4.						.00
5.						.00
6.						.00
7.						.00
8.						.00
9.						.00
10.						.00

other persons for whom drugs were purchased including husband or wife and all dependents.

CLAIM MUST BE POSTMARKED BY OCTOBER 31, 1974.

CERTIFIED STATEMENT OF CLAIM

I certify that the information contained in the Claim Form is true and correct to the best of my knowledge and that this Claim Form constitutes the only claim being made on behalf of those persons listed herein. I further certify that no drugs for which purchases are being claimed on this form were paid for by a welfare agency.

DATE SIGNATURE OF CLAIMANT

TO BE VALID CLAIM MUST BE SIGNED AND DATED HERE.

II Page 3

Prior to the mailing of Claim Form A, which was scheduled for the end of July 1974, a wide vanety of related efforts were necessary. Several examples include: (a) A Spanish language version of the claim form was developed. (See Exhibit 5). (b) A letter was sent to each of those individuals who had opted out of the original class action; they were informed of the imminent claim form mailing and were instructed that their previous decision to opt out precluded them from participating in this refund. (See Exhibit 6). (c) Representatives of the largest state pharmaceutical association were asked to notify their affiliated pharmacists of the mailing and to supply them with material which would make it easier for them to answer the anticipated queries of consumers. (d) The California Board of Education gave its consent to the development of a program in the California schools through which the nature of our program would be made clear to the students and through them, hopefully, to their parents. (See Exhibit 7).

Throughout this period of late Spring and early Summer, 1974, an enormous amount of activity took place to prepare for the publicity program. As noted before, the goal of the publicity was to alert consumers *in advance of the mailing* that their claim forms would soon be arriving. The major tool of this effort was the preparation of radio and television messages to be run without cost on public service time. The Ruhr agency contacted the Advertising Clubs in five of the six states, and in each case achieved consent to have that club sponsor this project as its major public service project of the year. This was immensely helpful in contacting radio and television stations in each state and receiving time allotments for our messages. Members of the Ruhr agency visited each state except Hawaii for this purpose and as a consequence achieved what is believed to be the largest commitment for public service time ever given to a specific commercial in those areas. Their efforts were augmented in many instances by those of the State Attorney General Offices. For example, Washington State had a well developed program of publicity coordination.

The efforts of the Ruhr agency were not limited to the broadcast media. Newspaper ads were developed and were made available to papers in the six states on a public service basis. In the interest of immediate impact, a simple phrase was developed to describe the whole program: "Operation Moneyback". A comprehensive press kit was developed and made available to members of the media and to newspapers and magazines in the six states. (See Exhibit 8. An example of print media material is reproduced on the next page).

In July 1974 the commercials were produced. Each radio and television station would be supplied with two messages, to be used in whatever combination each station desired. The first commercial utilized Mr. Joseph Campanella, a well known national television personality who very graciously agreed to perform this task for the minimum Actor's Equity Fee. The second message involved the Attorney General of the state in which it would be shown (with the exception of Hawaii). The decision to utilize the Attorneys General was made as a result of the market study, which indicated that the participation of such officials would assist the goal of public acceptability of the program. In addition to these commercials, Spanish language tapes were prepared for distribution to Spanish language radio and television stations. We received exceptional cooperation from these stations in the use of this material.

In late July 1974, during the week before the mailing of the claim forms, press backgrounding sessions were held in Seattle, Washington; Portland, Salem and Medford, Oregon; San Francisco, Sacramento, Los Angeles and San Diego, California; Salt Lake City, Utah; and Wichita, Topeka and Kansas City, Kansas. The Attorneys General of these states participated fully in these backgrounding sessions, in some cases attending them in person. The Special Master or members of the Ruhr agency working under his direction participated in each of the background sessions. In each of these meetings the project was carefully explained to the representatives of the media, and the tapes made available to them for public service purposes. At each meeting it was carefully explained that the distribution funds were the result of a negotiated settlement, rather than a final judgment of any kind, and that there had been no finding of overcharge or any other wrongdoing by any of the drug companies. It was emphasized that no fault or wrongdoing could or should be attributed to any of the drug companies who had been parties to the settlement.

Pursuant to Administrative Order 74-58, the American National Bank of St. Paul was designated as Escrow Agent for receipt of the funds. The total fund, consisting of $38,506,645.43, was divided into three funds. Fund A, consisting of $26,651,645.43, was designated for the consumer settlement. Fund B, consisting of $7,355,000, represented that part of the total settlement which was for institutions. Fund C, consisting of $4,500,000, was set aside for payment of administrative costs and out of pocket expenses. A small portion of Fund C was kept in a checking account with the rest being invested in short term certificates of deposit to be available as needed. (See Exhibit 19).

Funds A and B were invested by the Escrow Agent for longer periods of time. Pursuant to direction of the Court, bids were solicited on both Funds from financial institutions throughout the country. Fund A was originally invested for a six month term with the Bank of America. When the certificate was due, bids again were solicited and the fund was transferred to the Chemical Bank in New York. The deposit at all times has been fully collateralized pursuant to Order of the Court. Fund B has since been paid out to the institutions.

At the end of July 1974 the claim forms were mailed, at third class bulk rate, to nearly twelve million households.

The United States District Court has approved a landmark settlement. As a result, nearly twenty-five million dollars is waiting to be claimed. You're entitled to your share.

Between 1954 and 1966, several major drug companies allegedly overcharged consumers for commonly prescribed antibiotics.

Almost everyone used these drugs to treat flu, ear infections, respiratory infections, acne, cystic fibrosis, strep throat, and many other common physical ailments.

As a result of a court approved settlement of a class action suit, consumers are now entitled to receive their money back.

If you haven't already, you'll soon receive a claim form from the State Attorney General.

Take time to read it. Then fill it out. It's simple. Return the form to the claims office. If you used the drugs, you'll get money back. No written proof of purchase is necessary on total purchases less than $150.

Operation Money Back means more than money.

The success of Operation Money Back will help determine the future of consumer rights for generations to come. So stake your claim. There's more than money at stake.

CASH REFUND MESSAGE

If you lived in any of these states during the period 1954 through 1966

AND

Purchased any of these antibiotic drugs

You will receive a cash refund if you complete the simple form inside. You do not need documented proof of drug purchases.

CLAIM YOUR FAIR SHARE.

OPERATION MONEY BACK

Prior to mailing, they had been carefully broken down into each of the zip code areas in the six states. Post office officials had been briefed about this mailing and had made arrangements to facilitate it. In addition to the mailing, extra claim forms had been made available at post offices in each zip code area. The publicity program, which was then at its height, emphasized that any person not receiving a claim form could obtain one at his local post office.

In each of the zip code areas in which over half of the residents bore Spanish surnames, a Spanish language claim form was mailed along with the English version. At the top of the first page of the English language form was printed a message in Spanish which stated that Spanish language forms could be obtained by telephoning a toll free number also printed therein.

From the outset the response to the mailing was heavy. The form had been designed as a self-mailer, so completed forms needed only to be re-folded, a stamp affixed, and mailed. They were received at a post office box in San Francisco and delivered each day to the Claims Processing Center. Throughout the period the Ruhr agency maintained communication with hundreds of radio and television stations to urge repeated use of the taped messages. (See Exhibit 9).

Processing of the forms at the Claims Processing Center was conducted for the most part by personnel contracted through C.S.C. There were as many as 90 individuals so employed. Forms were initially separated by state, then numbered, then examined by the clerical staff. Forms which were not correctly returned, e.g., which lacked signatures or the amount of drugs purchased or other necessary information, were returned to the claimant with a letter indicating the nature of the defect(s) and a request to correct such defects(s) and return the form before the announced deadline of October 31, 1974. Acceptable claim forms were key-punched and put on the computer.

Most of the problems of processing forms had been anticipated by the months of consultation and testing that preceded the mailing. Some new questions did arise, however, and the representatives of the six states, together with the Special Masters, were in constant communication throughout this period. Many of the matters to be attended to were supervisory or clerical, and did not require the attention of a committee to be resolved. Accordingly, Mr. David Zeff, a member of the California bar, was hired as a full-time coordinator of activities at the Claims Processing Center, working under the direct supervision of the Special Master. Mr. Zeff has discharged his duties with exemplary energy, intelligence and patience. Much of the success of the project is due to his efforts.

The number of claim forms received was higher than anyone had predicted. The claim forms were mailed at the end of July 1974. The deadline for returning them, which was printed in capital letters and bold type on each claim form, was October 31, 1974. Nearly one million claim forms were received and put on the computer. The exact number of accepted Claim Forms A was 980,851.[12] The breakdown by states was as follows:

California	746,653
Washington	78,701
Kansas	73,268
Oregon	61,683
Utah	28,101
Hawaii	2,445

This represents the largest number of claimants in any consumer class action settlement to this date. Its magnitude can be seen by comparison with the 1969 settlement, in which 37,000 claims were filed on behalf of similar consumers in 43 states. It is hoped that the size of the return in this distribution will put to rest the contention that large scale settlement distributions of this nature are not "manageable."

It is well understood that the numerical size of consumer response, regardless of its magnitude, is not by itself the sole and definitive test of manageability. It is important as well that the response be meaningful, i.e., that there be some assurances that the claims were not fraudulently filed and were reasonably based upon actual purchases.

Several checks were established to determine whether this was the case as regards this distribution. These checks support the conclusion that the claimants exhibited a high degree of honesty in filling out their claim forms.

A major source for this conclusion is the study conducted by Far West Research for the Special Master and delivered to him on December 30, 1974. (See Exhibit 10). The purpose of the study was to determine how claimants for the prescription refund program arrived at the amount of their claims. The initial sample for this study was comprised of 500 randomly selected Claim Forms A, for which no written proof had been requested. Interviewing of claimants in this sample was conducted from the office of Far West Research.

Of the 253 claimants who used some type of record to determine the amount of their claims 73% said "Yes", they would allow an investigator to see the documents, and 18% said they would not. The primary reason for the refusal was that documents were not specified in the original form. Nine percent of the claimants said neither yes nor no to this question. They felt that permission would be necessary

[12] It was later determined that a comparatively small number of these were claims from those whose stated age would have been too low during the thirteen year period to support the assumption that they had themselves been the purchasers of the drugs. Accordingly, their claim forms, numbering 22,000, were returned. Accompanying each of these return forms was a letter explaining the reason for the rejection and affording the opportunity for a reply from any claimant seeking to establish that despite his extreme youth during the time period he had in fact purchased the drugs. Several claimants so replied, and in appropriate instances their claims were accepted. (See Exhibit 18).

from the pharmacy, doctor, or hospital, or that the documents were no longer available for examination.

All respondent-claimants were asked if they would authorize their doctor(s) to allow an investigator to examine medical files of those persons represented in their claims. Seventy-five percent said they would, 19% said they would not grant permission, and the balance, 6%, said the files were probably not available to anyone or did not exist anymore. Since many of those who did not grant permission might well have been motivated by factors other than fear that their claims were inaccurate, e.g., some could have been reluctant to burden their doctors with any sort of investigation, these figures seem to represent a very high degree of consumer faith in the accuracy and honesty of their claims and a consequent willingness to permit those claims to be subjected to independent verification.

An additional check was conducted to help determine the degree of honesty of those filling out the claim forms. Such a check had been anticipated by the requirement that each claimant using Form A be required to state his driver's license number, if any. One possible form of fraud would have been for a single individual to have obtained and filled out numerous claim forms. This type of fraud was rendered much less likely by the computer capacity to check duplicate license numbers. Awareness of this possible check would discourage a claimant from repeating the same license number on several claim forms. It would have been possible, however, for dishonest claimant to have used a different license number on each of his fraudulent claim forms. It was necessary to determine whether this practice was taking place. Accordingly, a probability sample of the claimants in California and Washington was selected and a list of driver's licenses prepared. (For those without license numbers, addresses and telephone numbers were recorded.) The total sample size for the two states was 600. Only the license numbers were submitted to the California and Washington bureaus of motor vehicles, and the corresponding names and addresses were returned by those agencies to the respective offices of the Attorneys General. The addresses and telephone numbers for those without licenses were checked out by state investigators. In *every* case, the holder of the license (or the resident or telephone owner) was found to be the same as the signer of the Form A claim.

Claim Form "B". As soon as the final deadline for Claim Form A had passed intensive work began on designing and testing of Claim Form B. This form would be sent to all claimants whose claimed purchases were in excess of $150. Of the 280,851 claimants whose first claim form had been processed, 186,522 were mailed Claim Form B. The basic function of Claim Form B was to elicit reliable proof for the purchases claimed. The form by necessity was more detailed than was Claim Form A, but the goal of clarity was maintained with the second form as well.

Much discussion took place over what would constitute the "best" form of proof. Letters from physicians or pharmacists relating the actual drugs prescribed would constitute excellent proof, but such letters might be difficult for the claimants to obtain. Some claimants would not wish to put their doctor or pharmacist to the trouble of preparing such a report. Others might be discouraged by the possible expense involved. And in still other cases the records might no longer be available – it had been as long as twenty years since some of the prescriptions had been made. Doctors and pharmacists had died or moved; records had been destroyed. Other forms of proof – such as check stubs or income tax deduction records – might be more readily available but of less precise help in justifying a particular claim. It was felt that a general description of the illness for which the claimed purchase was prescribed would be helpful in evaluating the claim.

Once again, market research was of very great assistance. Claim Form B was subjected to market testing by Far West Research, Inc., of San Francisco. After pretesting (see Exhibit 11), design modification, and a second test (see Exhibit 12), a workable form was developed (reproduced on pages 164 & 165). It gave each claimant the right to choose between three alternatives. The first was to send actual documentation, examples of which were described. The second alternative applied to those claimants who did not still possess such documentation. It permitted them to send a letter describing the nature and duration of illnesses for which the drugs had been prescribed. Alternatives I and II were required to be signed and notarized by the claimant before being returned. Alternative III was for those claimants who chose neither to send documentation or a letter describing the drug usage. This alternative simply gave permission to the Court to determine the fair amount of refund. There was no notarization requirement for alternative III.

The auditing requirements for Claim Form B were much more sophisticated than for Claim Form A. The task of establishing those requirements and setting out new processing procedures was aided immeasurably by the assistance of Benjamin King, Ph.D., the Grant I. Butterbaugh Professor of Quantitative Methods in the School of Business Administration at the University of Washington at Seattle. Dr. King was retained by the Court to assist in the planning, execution, and evaluation of reliable processing techniques. His professional discipline, insight, and resourcefulness were of great assistance. He was regarded by the Special Master and the class representatives as an invaluable resource.

On January 30, 1975, 186,522 Claim Forms B were mailed using first class postage, (Spanish language versions of Claim Form B (see Exhibit 14) were sent to each claimant who had used the Spanish language version of Claim Form A.) The deadline for their return was March 10, 1975. The final number of these forms which were completed and returned was 122,528. Of these, the breakdown by state is as follows:

California	93,511
Washington	9,685
Kansas	8,144
Oregon	7,403
Utah	3,589
Hawaii	196

The processing and auditing of Forms B were executed as follows:

1. All incoming forms were checked initially for enclosures, signatures, and notarization (in the case of election of Alternatives I and II).

2. All returned Forms B with accompanying documents or correspondence were read in full by a screening team of highly skilled clerical personnel, trained to look for completeness of proof, mention of inappropriate illnesses, drugs not covered by the suit, etc., as well as aberrant responses. The team was instructed to pass *all* questionable cases on to a higher order review group (the Committee of Counsel, whose membership included counsel from each of the six states).

3. In addition to cases that were found to be questionable or suspicious by the screening team, the Committee of Counsel audited a special statistical sample of the returned Forms B. It was decided in advance of the mailing of the second form that the two most critical indicators of potential fraud by claimants were (a) the total amount of claimed purchases, and (b) the number of dollars purchased per person per year (easily computed from information provided in Form A). Thus, in the light of available resources in time and manpower, it was decided that all Forms B greater than $1,000 in purchases, or with dollars per person per year greater than $60, or both, would be sent to the Committee of Counsel for special review. This procedure was designed to ensure that at least 40% of the original Form B purchase dollars would be audited. So that valid statistical inferences could be made about the claims that did not fall in the special stratum defined above, a probability sample of remaining claims was selected for review by the Committee of Counsel.

It was necessary to select the claims to be reviewed by the Committee of Counsel in advance of the mailing of Forms B so that distinctively colored labels could be used which would facilitate handling. Hence the workload could only be estimated in advance. Also the degree to which claims not in the review sample would be passed forward to the Committee because of discrepancies or inadequacies could not be known in advance. The final result was the careful scrutiny by the Committee of Counsel of a total of 20,871 claim forms accounting for $27,770,870 in original purchases, or 43.9% of the original purchase dollars of the forms that were returned.

If we consider only the claims that were returned as Alternatives I or II, the audit by the Committee of Counsel covered $10,117,963 in original amount of purchases, or 68.5% of the total dollars of returned claims in those categories. Every Alternative I and II was reviewed at least once. The audit, including preliminary review by the clerical staff and intense review by the Committee of Counsel, resulted in a reduction of total purchases in categories I and II down to 8,905,997, or 60.3% of the original amount claimed.

The Committee of Counsel worked very diligently for several months in the careful examination of these proof of purchase forms. Members of the Committee worked together in the same room of the Claims Processing Center, under the direction of the Special Master, and were encouraged to consult with one another about difficult claims. Frequently, when the proof of purchase documents seemed inadequate in some regard, members of the Committee of Counsel would telephone the claimant or, with the claimant's permission, his doctor or pharmacist, to acquire additional information.

Some letters and documents described drug purchases which were unusual either in terms of their quantities or the medical problem for which they were allegedly prescribed. To help the Committee of Counsel determine the legitimacy of such claims, it was necessary to obtain professional medical assistance, preferably from a doctor who had himself prescribed broad spectrum antibiotic drugs in one of the six states during the relevant period. To perform this important function the Court retained the services of Dr. Sheldon Cable, who has been engaged in the general practice of medicine in San Francisco since 1959. Dr. Cable is a member of the staffs of St. Francis Hospital and French Hospital in San Francisco. He is the President-Elect of the San Francisco Academy of Family Practice and is Co-chairman of the Medical Review and Advisory Board of the San Francisco Medical Society.

Proof of purchase forms which required Dr. Cable's attention were set aside for that purpose and carefully reviewed by him on a regular basis at the Claims Processing Center. His comments on each form were submitted to the Committee of Counsel and were exceptionally helpful in its final determinations. Dr. Cable's patient, thorough, and conscientious work, based on experience and scholarship, enabled many of the larger and most difficult claims decisions to be made with the maximum accuracy and fairness. His interest in the project and the wide scope of knowledge he brought to it were of very great assistance. The Committee of Counsel and the Special Master are greatly indebted to Dr. Sheldon Cable for the excellent services he provided.

Of the 185,825 Claim Forms B that were mailed, 122,528 were returned, a response rate of 65.9%. (Those not returned were awarded no refund. It had been clearly stated on each Form B that this was a possible consequence of failure to return the form.) The fact that the percentage of original purchase dollars, 65.1, covered by the returns is slightly lower than the response rate in claims indicates a slightly higher incidence of nonresponse among the higher dollar claims, but the discrepancy is not large enough to be

United States District Court
Antibiotic Drug Settlement

Request For

PROOF OF PURCHASE

Dear Claimant:

Operation Money Back is handling the refund payments in the Antibiotic Drug Case for the United States District Court. We wish to acknowledge the purchase claim for your household in the amount shown on the label above.

To honor every refund claim as quickly and equitably as possible we need your cooperation. The Court requests that you carefully read the three alternative methods for verifying your purchase of antibiotics. Then select the alternative that is best for you. The amount of your refund will be based on the degree of proof that you submit, therefore we urge you to submit as detailed a reply as possible. Every household with a claim over $150 is required to complete and return this form before their claim can be paid.

Please read this entire form before selecting your alternative, and place a check in the box beside the one you choose.

FIRST ALTERNATIVE: Proof of purchase documents ☐

Any of the documents and sources of statements named below, or partial documentation and statements, may be submitted. Documents and/or statements from sources other than those listed below are also acceptable.

A. Look through and make photocopies of your own records (these documents cannot be returned) of drug purchases and illnesses of family members between 1954 and 1966 upon which your claim is based. Drugstore receipts, check stubs, cancelled checks, doctor bills, hospital records, tax returns showing deductions for medical, dental, pharmacy or hospital expenses, are examples of acceptable documents.

B. Contact the drugstores where you purchased prescriptions and request a letter stating the names of medications sold to you, or the prescription numbers, the dates sold and the amount charged for each prescription

C. If the family member was hospitalized for the illness, contact the hospital and request a letter stating the name of the person hospitalized, the dates of hospitalization, the name of the illness, and the names and quantities of antibiotic medication administered.

D. Contact the doctor(s) who treated the illnesses for which these antibiotics were used. Request a letter stating the name of the family member treated, the illness, the period of the illness, the medication prescribed, and the number of prescriptions written.

E. Attach these documents or letters to this form, and take them to a notary public for notarization. Send the documents together with this form to:

United States District Court
c/o Operation Money Back
P.O. Box 3964
San Francisco, CA 94119

Please put your claim number on all correspondence, documents and statements. These documents cannot be returned.

SEE FORM ON REVERSE SIDE

SECOND ALTERNATIVE Letter describing purchases ☐

If you have made a reasonable effort to gather the requested proof of purchase documents, and you have been unable to procure them, you may elect this alternative.

A Write a letter to the United States District Court supplying the following information (Please type, print, or write clearly)

(1) Detail the efforts you have made to obtain the documents and/or statements.

(2) List the names of the family members for whom you are making a claim For each member claimed describe the medication and the illness for which it was used, the time period of the illness, and the amount spent for medication.

(3) If possible, list the names and last known addresses of the doctor(s) who prescribed the medication, and the name and address of the pharmacy or hospital where the medication was obtained.

B. Take the letter and this form to a Notary Public who will witness your signature to this form.

C. Send the letter, together with this form, to.

United States District Court
c/o Operation Money Back
P.O. Box 3964
San Francisco, California 94119

Please put your claim number on all correspondence.

THIRD ALTERNATIVE If no documentation or letter submitted ☐

If no documentation is available, and if you do not wish to submit a letter describing purchases, you are requested to sign your name to the statement below. Notarization is not necessary and no penalty is implied.

I am unable to provide Proof of Purchase documents, and I do not wish to submit a letter describing antibiotic drug purchases. I authorize the United States District Court to determine the amount of my refund

Signature _____

NOTARIZATION OF SIGNATURE

I certify that the information furnished by me to the United States District Court is true and correct to the best of my knowledge.

Signature _____ Date _____

Subscribed and sworn before me this _____ day of _____, 197____.

Notary Public _____

PLEASE RETURN THIS FORM BEFORE THE EXPIRATION DATE

You must return this form with any documents you wish to submit postmarked no later than March 10, 1975.

We thank you for your cooperation.

Miles W Lord

Miles W. Lord
United States District Judge

very noteworthy. The analysis indicates that 11.8% of the returned Claim Forms B were awarded the full amount of purchase, whereas 88.11% were reduced in value, either by audit review or by the respondent's election of Alternative III. Only 162 claims, or 0.1%, were rejected outright, covering a total of $223,840 in claimed purchases. A full 82% of the respondents elected Alternative III, and in most cases these claims were reduced in purchase amount to $150. In some of the Alternative III cases there were accompanying statements or proof that led the auditors to accept the original amount or to reduce it to some value higher than $150.

The end effect of the auditing procedure, the election of Alternative III by respondents, and failure to respond was to reduce the total claimed dollars in purchases greater than $150 from $97,117,963 to $25,096,236, or 25.8% of the original amount. The amount of reduction, totaling $72,021,727, can be analyzed as follows: (1) $33,870,438 or 47.0% is due to non-response; (2) $32,195,075 or 44.7% is due to choice of Alternative III; and (3) $5,956,214 or 8.3% is the result of preliminary audit and review by the Committee of Counsel.

In summary, the total value of original purchase dollars for all claims as of January 25, 1975 was $200,163, 875. This was a raw figure, before any request for Form B documentation, review, or audit processes were applied to the files. Had no further checking taken place and an across-the-board payout been made, the consumers would have received only 10 or 11 cents on a dollar purchased. After the procedures described above were effected, however, the total file of approved purchases was reduced to about 61% of the original amount, making possible a greater rate of payout.

In each instance in which claimed purchases made under Alternative I or Alternative II were reduced or rejected, a letter was sent to the claimant informing him of the right to appeal the reduction or rejection. (See Exhibits 15 and 16). (No such letter was sent to claimants under Alternative III because that alternative specifically gave to the Court the right to determine the allowable claim, if any.) The claimant was therein notified that if he wished to exercise this right of appeal, he must so notify the Appeals Division at the Claims Processing Center within ten days of the date of his notice. A total of 59 claimants have pursued this right to appeal. Their hearings took place during the week of April 28-May 2, 1975, at locations as near to the residence of claimants as practicable. The Hearing Officers were Special Master Lebedoff, Special Master Bartsh and Court Administrator Zeff. Each appellant claimant received written notice of his hearing date and the location of the hearing, and was informed of his right to bring any additional information and to be represented by counsel (See Exhibit 20). In each hearing, the class was represented by counsel affiliated with the Attorney General of the state in which the claimed purchases were allegedly made. Each appellant claimant was further informed by written notice of his right to be present at the final distribution hearing on May 9, 1975 at the Federal Courthouse in Minneapolis, Minnesota. Notice of that hearing has been sent to each class representative as well.

Plan of Distribution

After allowance of attorneys' fees from the total Fund, the fund will be broken down into each state's share (based on settlement percentages). From each share, prorated costs of administration, future administration, and other approved payments from Fund C will be deducted. This will leave a "net share" for each state. From this "net share," the welfare payments will be deducted and an appropriate allowance for attorneys' fees from welfare will be added back in. This will leave a "net net share" for payment to the consumers. Each consumer will be paid the same percentage of the "net net share" as his approved purchases bear to the total approved purchases for that state.

Example:

Fund A + C	=	Total Fund
Less Attorney's fees and future administrative costs		
		Gross Fund
Each state receives its settlement portion	=	State Share
Less state's cost of administration and approved payments		
		Net Share
Less welfare		
Plus % of welfare for attorneys' fees		
Amount to pay consumers		Net net Share

Conclusion

The administrative procedures described above permitted this distribution to be successfully completed. Each of the five goals described at the outset was achieved. The total administrative costs involved were only slightly greater than the monies earned in interest by the settlement fund. (See Exhibit 17).

The success of this project illustrates that the distribution of refunds to very large numbers of consumers following true class action settlements is a "manageable" enterprise and that neither fairness nor due process nor

economy need be sacrificed in the effort to reach very substantial numbers of consumers. When a court is willing to make available to such a task the resources and encouragement necessary to support it, the task can be done.

AVAILABLE FROM THE C.A.R. PLEADINGS LIBRARY

Exhibit	Description	CAR Order No.
1	Contract between court and data processing firm for the computerization, processing, and analysis of claims, including description of work, schedule of performance and billing, and other terms and conditions	ST-10(a)(27 pp)
2	Market research firm's pre-test report on proposed claim form, describing attitudes and reactions of consumer panels to "focus group interview session" technique	ST-10(b)(15 pp)
4	Market research firm's pre-test report on consumer attitudes and reactions to revised claim form	ST-10(c)(13 pp)
5	Spanish language version of claim form A	ST-10(d)(4 pp)
6	Letter instructing persons previously opting out of class not to respond to claim form when received	ST-10(e)(1 p)
7	Instructional packet distributed to California public school teachers, including background information, lesson plans, classroom skit, quiz, and suggested outside classroom student projects to increase public response to claim form mailing	ST-10(f)(23 pp)
8	Press kit distributed to members of broadcast and print media describing settlement, publicity campaign, and importance of public response to refund program for future viability of large consumer class actions	ST-10(g)(15 pp)
9	Public relations firm's memo on follow up contacts with media to monitor and urge airing of public service messages about refund program, including summaries of progress and problems for each station contacted	ST-10(i)(12 pp)
10	Research firm's report on sampling survey to determine how form A claimants arrived at amounts claimed, extent and nature of documentation, and willingness to allow investigators to inspect documentation, including cross-tabulations for amounts claimed, number of persons per claim, age of claimants, number of prescriptions per claim, etc.	ST-10(k)(27 pp)

11	Research firm's pre-test report on claimant comprehension and reactions to proposed claim form B	ST-10(l)(12 pp)
12	Marketing firm's pre-test report on claimant comprehension and reactions to revised claim form B, including cross tabulations for amounts claimed, perceptions of evidentiary requirements, response alternatives selected, etc.	ST-10(m)(32 pp)
14	Spanish language version of claim form B	ST-10(n)(2 pp)
15	Letter to claimant rejecting claim and affording notice of right to appeal rejection	ST-10(o)(1 p)
16	Letter to claimant reducing amount claimed and affording notice of right to appeal reduction	ST-10(p)(1 p)
17	Statement of settlement administration expenditures	ST-10(r)(2 pp)
18	Letter to claimant rejecting claim for drug purchases allegedly made at a time when claimant was a minor and offering claimant an opportunity to certify that he in fact made such purchases	ST-10(j)(1 p)
19	Court's order apportioning settlement fund into sub-funds and approving escrow agent and fund investments	ST-10(h)(14 pp)
20	Letter to claimants who requested appeals noting time and place of appeal hearing	ST-10(q)(1 p)
n.a.	California Economic Brief	ST-10(s)(68 pp)

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March 8, 1976

To: Honorable Philip A. Hart
Attention: Mr. Nash

From: American Law Division

Subject: Constitutional Questions in re Parens Patriae Title of S. 1284

This is in response to your request for an evaluation of several constitutional questions that have been raised about title IV of S. 1284, which would authorize state attorneys general to bring civil actions for damages as parens patriae of residents of the State or with respect to the general economy of the State to recover for injuries caused by violations of the federal antitrust laws.

(1) Whether Warth v. Seldin holds that Congress cannot bestow standing upon these state officials:

In Warth v. Seldin, 422 U.S. 490 (1975), the Court held that under Article III and under judicial rules governing prudential limitations upon federal court involvement in controversies none of the plaintiffs seeking to attack a town's exclusionary zoning policies had alleged any harm to himself that permitted him to invoke the power of the federal courts. Essentially, Warth is an example of that class of justiciability cases insisting that a person attacking the constitutionality of a statute or other governmental action must in order to show the requisite interest in suing demonstrate that he has been injured or that he will be certainly injured. The Constitution of the United States of America - Analysis and Interpretation, S. Doc. No. 92-82 (Washington: 1972), 638-640.

Two points may be raised in response to any reliance on Warth. First, the States clearly have the right to bring suits in numerous situations as parens patriae of the citizens of those States. See Hawaii v. Standard Oil Co., 405 U.S. 251, 257-260 (1972). The Court has permitted a suit by a State so acting for injunctive relief under the antitrust laws, Georgia v. Pennsylvania R. Co., 324 U.S. 439(1945), but it rejected a suit for damages under §4 of the Clayton Act not because the State had no right to maintain a suit on behalf of its citizens but because the injury the State alleged was not itself compensable under the Clayton Act. Hawaii v. Standard Oil Co., supra, 259, 262-264. That is, the injury alleged, harm to the economy generally, was also injury to the State's proprietary interests and to the business interests of its citizens and damage awards for these injuries would not be precluded by an award of damages for the former alleged injury.

Second, the Court has indicated a number of times, and reiterated the point in Warth, that the actual or threatened injury required by Article III many exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing...." Warth v. Seldin, supra, 500, quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 h. 3 (1972); Sierra Club v. Morton, 405 U.S. 727, 732 (1972). "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. ...But so long as

this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in the support of their claims." Warth v. Seldin, supra, 501. An example of congressional grant of standing to a person who would not have otherwise had it under Article III may be found in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), in which the Court held that the definition in the housing title of the 1968 Civil Rights Act of "person aggrieved" as "any person who claims to have been injured by a discriminatory housing practice" conferred on white tenants of an apartment complex who alleged deprivation of the benefits of integrated housing standing to challenge the landlord's exclusionary policy.

Of course, in the light of the Court's recognition of the right of a State to sue in a parens patriae capacity on behalf of its citizens, one need not rely on the various permutations of the standing doctrine as revealed in Warth. That is, the proposed statute does not confer standing; standing already exists in the parens patriae context and the provisions of Title IV merely remove the statutory barriers determined to exist by the Court in Hawaii. But inasmuch as Warth has been raised, it can be observed that even on its own terms, if it were applicable, it would be no bar to the statute's validity.

(2) Whether Buckley v. Valeo imposes any barrier to enactment of Title IV:

In Buckley v. Valeo, No. 75-436 (January 30, 1976), the Court held that Congress could not vest in a body the majority of the members of which was appointed by Congress the enforcement of a great part of the federal election law. Enforcement of the laws enacted by Congress is an executive function to be performed by "officers of the United States" appointed pursuant to Article II, §2, cl. 2, which gives Congress no role in the appointment process. Apparently, the objection to title IV based upon Buckley is that it empowers state attorneys general to enforce part of the federal antitrust laws through the bringing of civil damage actions.

Buckley enforces the concept of separation of powers within the Federal Government. Functional separation is guaranteed through constitutional provisions that ensure that in the main, with some contrived overlapping, Congress will legislate, the executive will execute, and the judiciary will adjudicate. The concept is wholly concerned, as is Buckley, with the division of powers and responsibilities among the three branches of the Federal Government and not with delegating powers to state officials or providing for the enforcement of federal laws by private civil actions. Buckley announces no new doctrine, cf. Springer v. Philippine Islands, 277 U.S. 189 (1928);

Myers v. United States, 272 U.S. 52 (1926), and it would be strange if its principles were held to preclude Congress from doing what it has in fact done since 1789. Constitution of the United States of America - Analysis and Interpretation, op. cit., 888-891; see Ex parte Siebold, 100 U.S. 371 (1880). As we have observed above, the Court has recognized the right of States as parens patriae to bring suit under the federal antitrust laws, Georgia v. Pennsylvania R. Co., supra; Hawaii v. Standard Oil Co., supra, and it has as well approved the right under authority of federal law for private parties to bring treble damage actions for antitrust violations "not merely to provide private relief, but...to serve as well the high purpose of enforcing the antitrust laws." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-131 (1969).

(3) Whether Eisen v. Carlisle & Jacquelin, especially the Court of Appeals opinion, precludesthe enactment of title IV:

In Eisen v. Carlisle & Jacqueline, 479 F. 2d 1005 (C.A. 2, 1973), the court held unmanageable and thus not maintainable a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure. For our purposes here, two points in the court's decision can be isolated. First, the Court held that the requirement of Rule 23(c)(2) that notice must be given individually to all identifiable members of the class was not discretionary and must be followed; it implied that

such notice was constitutionally mandated as well. Id., 1015. Such a holding would affect the notice by publication provision of proposed §4C(b)(1). Second, the court held that the "fluid recovery" procedure attempted by the district court was not permitted by Rule 23 and that if it were it would violate due process. Id., 1018. Such a holding would affect the procedure, essentially the same fluid recovery device, authorized in title IV.

The Supreme Court affirmed Eisen at 417 U.S. 156 (1974), but in an opinion significantly more limited than the opinion of the Court of Appeals. It did not address the "fluid recovery" issue at all. On the question of notice, the Court described the Advisory Committee's development of the notice provision of Rule 23(c)(2), reflecting the Committee's understanding that due process required such notice, citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and Schroeder v. City of New York, 371 U.S. 208 (1962), as providing the "context" within which the Advisory Committee viewed the notice requirement. Id., 173-175. The Court then held that individual notice was "an unambiguous requirement of Rule 23." Id., 176. The only point at which the Court adverts to a constitutional requirement of notice occurs when it rejects plaintiff's argument that adequacy of representation can displace notice and Justice Powell observes

that if this were true it would permit no notice at all, much less personal notice. He then says, obliquely in the constitutional context: "This cannot be so, for quite apart from what due process may require, the command of Rule 23 is clearly to the contrary." Id., 177.

The Court then vacated the judgment of the Court of Appeals and remanded the case for further proceedings. Id., 179. The Supreme Court therefore did not endorse, even obliquely, the lower court's conclusion as to "fluid recovery" and it seems reasonably clear that its notice conclusion is founded solely on the "unambiguous requirement of Rule 23." Id., 176. The lower court's decision having been superseded by a more authoritative Supreme Court opinion and its judgment vacated, the lower court's constitutional conclusions have no precedential value. They do have what value is to be accorded them on the basis of the persuasiveness of the arguments under girding them. Time constraints have not permitted in this paper an evaluation of those arguments and conclusions but a second paper will follow.

It should be noted, however, that even as a holding of the Court of Appeals, prior to Supreme Court consideration, it is not clear that the Eisen opinion enjoyed the support of the full Second Circuit. On the Eisen panel were Judges Medina and Lumbard, who as Senior Circuit Judges, were no longer active members of the court, and Judge Hays. Judge Hays specially concurred in the result, not

the opinion, on the basis that the district court should not have placed 90 percent of the costs of notice on the defendants. 479 F. 2d, 1020. On the petition for rehearing en banc, the eight active judges of the Circuit voted 5 to 3 to deny rehearing en banc. Judge Hays voted to grant the petition without opinion while Judges Oakes and Timbers did so in a lengthy opinion attacking the constitutional conclusions of the panel decision as well as its construction of Rule 23, Id., 1021-1026. The five judges voting to deny rehearing joined in an opinion stating that they had so voted not because the case was unimportant but rather because it should receive Supreme Court consideration without the delay caused by en banc consideration. The opinion noted, with perhaps a noticeable concurrence, the dissent's discussion of the "far-reaching implications" of the panel's opinion. Id., 1020. Moreover, one of the five, Judge Mansfield, separately issued an opinion agreeing with Judge Oakes' "forceful plea for an en banc hearing", although he thought the matter should be speeded on to the Supreme Court. Id., 1021.

The point of this perhaps too-lengthy excursion is simply to suggest that it is not unlikely that the panel decision itself enjoyed less than majority support in the Second Circuit itself. See id., 1026 (Judge Oakes dissenting). Too much could be made of this possibility, of course, since it cannot be known what the points of disagreement were.

Johnny H. Killian
Assistant Chief

The Library of Congress
Congressional Research Service
Washington, D.C. 20540

March 22, 1976

TO : Honorable Philip Hart
Attention: Mr. Nash

FROM : American Law Division

SUBJECT: Constitutional Questions in re Notice and Disposition of Recovery Provisions of Title IV, S. 1284, Antitrust Parens Patriae Suits

This is in further response to your request for a consideration of the constitutional issues raised about the sufficiency of notice and the manner of distributing recoveries obtained through suits by state attorneys general as parens patriae of citizens of their respective States as provided in title IV of S. 1284.

The notice imposed in proposed §4C(b)(1) would be by publication in the manner prescribed by statute or rule of court in the State in which the suit was instituted or in the absence of a statute or rule in the manner prescribed by the district court. Proposed §4C(b)(2) then permits any person to exclude his claim from the action and binds any person not moving to exclude to the final judgment obtained in the action. The distribution of the recovery, proposed §4C(c)(2), is to be made in such a manner as to secure to each person or political subdivision injured the opportunity to share a pro rata portion of the recovery with the remainder either being escheated or applied for state general welfare purposes.

Constitutional objections have been raised to both parts of the proposal, based primarily upon the due process language of Eisen v. Carlisle & Jacquelin, 479 F. 2d 1005 (C.A. 2, 1973), aff'd on other grounds, 417 U.S. 156 (1974). Juxtaposing the class action form of suit in issue in Eisen and the parens patriae suit proposed in S. 1284 is especially pertinent in the context both of notice and of recovery disposition; reliance upon possible resolution of the constitutional questions raised by the former would, it seems, provide reasonable responsive answers to the questions raised by the latter, analagous action.

Under Rule 23(b)(3), as adopted in 1966, class actions may be maintained, provided the four qualifications of subdivision (a) are met, if the court "finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Subdivision (c)(2) requires that in class actions so maintained members of the class must be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Those members of the class who do not thereafter exclude themselves from the action are bound by the judgment entered therein. Subdivision (c)(3). 7 C. Wright & A. Miller, Federal Practice and Procedure (St. Paul: 1972, 1975 supp.), §§1753-54, 1785-90.

The Advisory Committee's Notes make plain that the members considered the notice provisions governing Rule 23(b)(3) class actions necessary "to fulfill requirements of due process...." 39 F. R. D. 98, 107.

The Court of Appeals in Eisen, supra, 479 F. 2d, 1015, in holding that Rule 23(c)(2) did in fact mandate individual notice to all identifiable members of the class, implied that such notice was constitutionally mandated as well. In affirming on the basis of the "unambiguous requirement of Rule 23", the Supreme Court cited Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and Schroeder v. City of New York, 371 U.S. 208 (1962), as providing the "context" within which the Advisory Committee viewed the notice requirement. Eisen, supra, 417 U.S., 173-175, 176.

If in fact individual notice to all identifiable members of the class is a due process constitutional requirement before judgments in such actions may be given res judicata effect to all the class in Rule 23(b)(3) actions, then it would be difficult, although not impossible, to defend constitutionally the publication notice provided in S. 1284, by which persons within the "class" represented by the state attorney general in the particular suit are afforded the opportunity to come forward and exclude themselves. It must therefore be ascertained whether such individual notice is in fact constitutionally required.

While Justice Powell in Eisen cited Mullane and Schroeder as providing the context for the Rule 23(c)(2) notice provision, the Advisory Committee cited as well Hansberry v. Lee, 311 U.S. 32 (1940), 39 F. R. D. 98, 107, and a reconciliation of these cases will be important to any resolution of the notice problem.

Mullane, it should be observed, was not a class action suit, though it raised similar problems. Under state law, a common trust fund could be created to facilitate the joint administration of small trusts. State law

authorized the trustee periodically to obtain court approval of interim administration by proceeding against all of the beneficiaries and giving notice to them by publication. In the action before the Supreme Court in Mullane, the bank had given actual notice to no beneficiary and had sought to litigate solely against an attorney appointed by the court to represent the beneficiaries who would thereafter be precluded from collaterally attacking the issues of administration foreclosed by the litigation. In an opinion by Justice Jackson, the Court held that no binding effect could be given to such a judgment unless actual notice had been given to all members of the class whose names and addresses were known and notice by publication given to those whose names and addresses were unknown.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. ...The notice must be of such nature as reasonably to convey the required information, ...and it must afford a reasonable time for those interested to make their appearance. Mullane, supra, 339 U.S., 314.

But as the Court observed, "[p]ersonal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents." Ibid. One exception to the general rule was explained in dicta in Hansberry, in which the Court refused to permit a state court to attach res judicata effect to a prior judgment against parties not represented in the prior action because the Court found that the action was not a class suit and could not have been inasmuch

as the claimed representatives had interests adverse to other members of the purported class. Supra, 311 U.S., 44, 46. The Court said:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in litigation in which he is not designated as a party...by service of process. ...To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. ...[T]here is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is res judicata as to members of the class who are not formal parties to the suit. ...[T]his Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it. Id., 40-42.

Thus, as the Hansberry Court said, "where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree." Id., 41-42. In Mullane, of course, none of the class of beneficiaries was before the court to represent the class, only an attorney appointed by the court, and, more important, "the interests of all the beneficiaries were not identical, for some were entitled to interest income, while others benefited from capital growth. Moreover, within these two groups, there was a significant likelihood of divergent interests." Note, "Managing the Large Class Action: Eisen v. Carlisle & Jacquelin," 87 Harv. L. Rev. 426, 435 (1973). However, in this respect, the Mullane Court did not require personal service by process, the more usual

formal requirement, but permitted service by mail, "under the circumstances." Supra, 339 U.S., 319. The circumstances were that the more costly personal service would be much more expensive than mailed notices and, of greater importance, that mailed notices would reach most of those interested who would then safeguard the interests of the group, the representative role in this regard:

> This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all since any objection sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable. Ibid.

The Court of Appeals in Eisen, supra, 479 F. 2d, 1017 n. 21, thought that Schroeder v. City of New York, supra, 212-13, had "refined the Mullane rule" to establish a general rule requiring individual notice whenever the names and addresses of individuals are known. "But Schroeder involved the condemnation of a single individual's interest in real property. It is unwise to read Schroeder, which dealt with a narrow situation in which a notice requirement is particularly compelling, as establishing a general rule so at variance with the Mullane balancing approach." Note, op. cit., 87 Harv. L. Rev., 434 n. 61. This approach is thus explained. "[T]he entire thrust of the case was that the amount of notice that would be required must be determined by balancing the interests of the state in bringing any issues to a final settlement and the interests of those involved in the action in

receiving notice." Id., 434. Balancing is explicitly the approach of the Mullane Court, supra, 339 U.S., 313-14 and it remains the approach of the Court today:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, No. 74-204 (February 24, 1976) (slip opinion at pp. 12-13).

Similar weighings of interests have been made in suits between private parties. E.g., North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974). "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961). But some form of hearing is required before an individual is finally deprived of a property interest, Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974), and the continuing receipt of such statutorily created benefits as welfare assistance, an "entitlement," is an interest protected by the due process clause. Goldberg v. Kelly, 397 U.S. 254 (1970). Fundamental in this scheme mandated by due process is notice reasonably calculated to inform an individual that he must assert his rights or lose them. Cf. Robinson v. Hanrahan, 409 U.S. 38 (1972). But even in situations in which a settled property right is disrupted by official action, due process may permit peremptory action without advance notice and

an opportunity to defend. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). Cf. Mitchell v. W. T. Grant Co., supra.; Arnett v. Kennedy, 416 U.S. 134 (1974).

That it is permissible to bind all the members of a class by a judgment obtained in a suit brought or defended by representatives of the class is established by Hansberry and is implicitly recognized and approved in Mullane; but this conclusion does not yet enable one to say whether due process requires notice to all class members sufficient to alert them to the decision whether to stay in or exclude themselves from the suit. The balancing that Mullane instructs us to follow and which the more recent cases elaborate and extend must be utilized to obtain the answer to this question and necessarily the answer will vary from case to case and from circumstance to circumstance.

Such a balancing test must therefore be applied on the individual facts in private litigation and it is instructive to note one suggested for the Eisen case. Note, op. cit., 87 Harv. L. Rev., 434-441. Eisen was, of course, an antitrust, treble-damage action on behalf of plaintiff and his class of odd-lot (shares of stocks traded in lots of less than a hundred) traders. Eisen's individual stake in the damage award was only $70 and it is unlikely that any member of the class had a much more significant stake. "Economic reality dictates that petitioner's suit proceed as a class action or not at all." Eisen, supra, 417 U.S., 161.

The Harvard Note argues, op. cit., 87 Harv. L. Rev., 435, that the governmental interest at issue in Eisen was its affirmative interest in seeing grievances involving large numbers of individually small claims be resolved.

Not only, therefore, would persons who had suffered losses too small to incur the costs of suing for compensation be made whole, but private damage claims deter antitrust violations and save governmental manpower, time, and money that would otherwise be expended in public prosecutions of the violations. This governmental interest would thus weigh in on the side of promoting the utilization of such suits, a promotion that would come to nothing if the representatives of the class had to bear the substantial expense of notice in order to proceed with the suit.

On the other side, notice would serve several private interests of class members. Id., 436-38. First, those members who wished to do so could exclude themselves and not be bound by the judgment in the action, thereby preserving their right to bring their own suits. The likelihood in Eisen of class members bringing their own suits was improbable because of the almost negligible recovery to be expected and thus this interest could be described as minimal. Supporting this conclusion are the statistics showing the very small percentage of those who receive notice in class actions who do choose to exclude themselves. Id., 437 n. 82. Second, notice affords other class members the opportunity to intervene in the conduct of the class action. Were the attorney of the class representative not to afford adequate representation or there to be divergent class interests, this opportunity could enable other class members to save themselves from being bound by a judgment that had not been prosecuted in the best manner. But Rule 23 would seem to impose on the trial court the obligation to consider both factors, as had been done by the trial court in Eisen, and Hansberry v. Lee, supra, in addition seems to suggest that res judicata would not be applied against class

members when representation was inadequate or the interests of one part of the class was favored over another. The third interest served by notice would be to alert class members to file for their share of the recovery in the event of a favorable judgment. Alternative procedures had been instituted by the trial court in Eisen.

The class action defendant has an interest in seeing that notice is afforded all interested class members as well. Id., 438-39. Only if due process is afforded absent class members is the defendant assured of the protection of res judicata accorded the judgment. But, again, individual suits when the expected recovery is small is unlikely and in another class action if the first trial court has engaged in a reasonable balancing it is not likely that the first decision would be overturned and if it were the additional notice required over the first would probably bring the second suit to a halt.

> To the extent that considerations of res judicata, judicial efficiency, and viability of the large class suit conflict, resolution lies not in subordinating one interest in the other two, but in balancing. The minimal increase in res judicata protection which might result from the strict notice required by Eisen III, the savings in judicial resources, and the insubstantial interest that absent class members have in receiving such notice, are unlikely to outweigh the benefits to be derived from permitting large suits to proceed. It would be ironic were the rigors of due process, designed to protect the interests of a class, to deny effective relief to that class. Mullane suggests that due process cannot be evaluated so mechanically; that, to the contrary, only by weighing the various interests at stake can a court in a given case develop procedures that will safeguard the interests of all parties. Id., 439-40.

The Supreme Court, ruling on the mandate of Rule 23 rather than on due process requirements, had no occasion to deal with balancing in this respect.

At one point, the Court did touch upon what due process required as distinguished from Rule 23. Rejecting Eisen's argument "that adequate representation, rather than notice, is the touchstone of due process in a class action and therefore satisfies Rule 23", the Court first noted that the Rule spoke to notice and to adequacy of representation. "Moreover, petitioner's argument proves too much, for it quickly leads to the conclusion that no notice at all, published or otherwise, would be required in the present case. This cannot be so, for quite apart from what due process may require, the command of Rule 23 is clearly to the contrary." Eisen, supra, 417 U.S., 176-77.

A balancing approach, then, would seem to lead one to conclude that personal service or service by mail is not always a prerequisite to giving res judicata effect to a judgment in a class action. Where giving of notice to a large number of class members would be so prohibitively expensive as to preclude the maintaining of the action at all, one may justifiably inquire whether the interests which the giving of notice is designed to protect are so weighty as to override the interests of government and individuals in having such an action maintained. Speaking of the governmental interest in Mullane of having the trust accounts settled, the Court observed that "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." Supra, 339 U.S., 313-14.

Similarly, a weighing or balancing of the interests involved in the successful prosecution of the parens patriae action authorized by title IV of S. 1284 would suggest that a notice by publication would in many if not all cases comply with due process mandates.

Governmental interests in the maintenance of such suits can be said to go beyond those implicated in private class action suits. Here too there is the interest in providing a mechanism by which thousands or millions of grievances that involve claims too small to make viable any individual suits be be resolved. Here too there is the federal interest in allowing enforcement of the antitrust laws to be accomplished through a device that does not require the expenditure of the limited amount of federal manpower and funds that would be necessary were a federal criminal prosecution to be brought.* Here too the bringing of such actions operates to deter violations of the antitrust laws, violations that might because of the small effect upon each of several thousand or several million individuals go unremedied. But there is additionally the state interest in recovering for the injury to its economy, in protecting the property and security of its citizens, and in seeking to regulate more rationally the economic struggle within its jurisdiction.

Whatever weight these various interests may be given in any decision on the desirability of permitting or encouraging the maintenance of parens

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*That this consideration of cost to or saving to government is a factor to be weighed in any due process calculation was made clear most recently in Mathews v. Eldridge, supra, (slip opinion at pp. 25-6). Denying a claim that due process required a pretermination hearing in social security disability cases, the Court weighed in "the public interest."

"This includes the administrative burden and other societal costs that would be associated with requiring a pretermination hearing. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision...."

"Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost."

patriae actions, they of course are only interests to be weighed in a balance and are not determinative per se. The interests served by notice are identical to those interests identified to exist in the individual class action suits. Notice affords individuals with a claim of their own the right to exclude themselves from the action and thus not to be precluded by res judicata from bringing their own actions and it affords these individuals the opportunity to intervene in the conduct of the action to ensure that the action is adequately maintained and that their interests are protected. What weight do these interests have?

Congress in deciding whether to enact title IV could give express consideration to several factors in evaluating these interests. First, if an individual does not exclude himself from the action and is thereafter precluded from bringing his own action, what property interest has he been deprived of? That interest must be the recovery, or more correctly the potential recovery, that the individual would obtain if he brought his own suit, proved a violation, and proved his damages. That the property interest is so contingent does not make it undeserving of due process protection, but the nature of the interest, including the possessor's assurance of unconditional right to it, cf. Mitchell v. W. T. Grant Co., supra, 416 U.S., 603-604; and see id., 624-25 (Justice Powell concurring), does have a substantial bearing upon the degree and nature of the protection accorded.

Second, Congress could determine that small likelihood existed of either individual suits or class action suits by a group were they not precluded by res judicata in a judgment in the parens patriae action. It might rely on the statistics gathered by certain parties showing that only

a small number of persons choose to exclude themselves. Harvard Note, op. cit., 87 Harv. L. Rev., 437 n. 82. It might also rely on the conclusion that the ordinary claimant of a small potential recovery is highly unlikely ever to sue on his own.

Third, Congress may conclude, as the Hansberry Court expressly and the Mullane Court implicitly recognized, that adequacy of representation on the part of the state attorneys general will operate to protect the interests of all those class members who could, although it is not likely that they would, either exclude themselves or intervene in the action to press their own interests. The trial court under Rule 23 must determine that class interests are common and that the interests will be adequately represented; it seems reasonable for Congress to conclude that in the circumstances under which parens patriae actions are to be brought there is an identity of class interests and that the attorney general will provide adequate representation.

Fourth, while none of these factors nor any combination might constitutionally justify dispensing entirely with notice, Congress might well conclude that notice by publication is likely to reach all those persons who would respond to notice. Such persons are presumably those who have suffered substantial damages that distinguish them from those who because of the smallness of claims lack the incentive to proceed on their own. These persons, individuals and corporations, are likely to be fairly well off economically and involved in the economic life in the State, therefore being more well informed than people generally and more apt to obtain notice by publication.

The other interest served by notice is that of being enabled to claim to share in the recovery. Here too additional notice following the

suit, the publicity attendant upon the prosecution of the suit, and the application of the recovery in the public interest generally are factors Congress could weight as protecting this aspect of the interest.

Defendant's interest in being afforded the protection of res judicata is also implicated in the question. If it should be determined following a successful parens patriae action that due process had been denied unnotified members of the class, then the defendant might be required to expend much time and money in relitigating the same issues and be subjected to recovery twice for the same damages. Congress here could weigh in, again, the likelihood that those claimants with only small recoveries all prospect would ever bring a separate suit; too, since unclaimed amounts of the recovery have gone into the state treasury a court if it were ever faced with the possibility of double recovery would not seem unpossessed of the power to rectify the situation.

No clear answer can be offered. Questions of due process are usually questions of degree. It can be stated, however, that it does not appear to be the case that due process in this situation requires either personal or mail notice to class members as a definite and foregone conclusion. Rather, it appears that the application of the balancing test required to resolve due process issues could permit Congress to resolve expressly that notice by publication would under all the circumstances best protect all interests involved, a resolution that is of course entitled to judicial deference.

A second constitutional argument is predicated upon the Court of Appeals opinion in Eisen that was addressed to the issue of so-called "fluid recovery." Supra, 479 F. 2d, 1012, 1013-14, 1017-18. The trial court had held that individual assessment of damages would be so costly as to consume the recovery and thus opted to permit damages to be calculated from the defendants' records. Out of the amount determined to be owing, the claims of the persons submitting them would be paid and the remainder would be used to reduce the cost of future odd lot transactions. The Court of Appeals determined that such a procedure was not authorized by Rule 23 and would if adopted violate the Rules Enabling Act. But it also went on to say that even if "any such fantastic procedure" were authorized, "the courts would have to reject it as an unconstitutional violation of the requirement of due process of law." Id., 1018.

Under title IV, the respective attorneys general suing would be authorized to recover the aggregate damages sustained by the persons or political subdivisions on whose behalf the State sued without separately proving the individual claims of each such person or political subdivision. Disposition of the recovery would be made first through distribution to persons or political subdivision for their damages and then the funds remaining would be escheated or used for general welfare purposes.

The Eisen court did not analyze the "fluid recovery" device in constitutional terms and the opinion is thus silent with respect to the constitutional flaws the court discerned in the device. The Harvard Note, op. cit., 453-54, identified two possible objections:

> One possible argument may be that if damages are estimated in gross, rather than proved individually,

> defendants may be unfairly assessed for greater damages than were actually suffered as a result of the illegal behavior. This argument, however, attacks the validity of the proof of damages, that is, the quality of the evidence, not the fluid recovery per se. The evidence necessary to prove damages on a fluid recovery theory should be as great as when individual claimants attempt to prove antitrust damages.
>
> What the circuit court may be implying is that a defendant has the due process right to pay damages only to identified injured entities; that there is something fundamentally unfair in the notion that damages may be claimed in the abstract on behalf of someone who never appears before the court and then distributed to third parties who suffered no injury. While there may be a surface appeal to this argument, it should not be overlooked that by hypothesis the corporate defendant has profited by illegal activity which has injured others. The rational connection between the group injured -- prior traders -- and those who will benefit from the damage award -- future traders -- suggests that the fluid recovery is justifiable as a compensatory mechanism even though the correlation between the two groups is imperfect. Moreover, while compensatory damages are the norm in civil actions, it is recognized that such actions may validly serve a deterrent function as well. Indeed, antitrust violations are considered serious enough to merit punitive damages; thus, the fluid recovery, to the extent that it does not serve a purely compensatory function, may be justified as a prophylactic measure to discourage violations.

There are instances in which funds recovered in damage actions have been applied to the general benefit of the public or to classes of persons within the public. Bebchick v. Public Utility Comm., 318 F. 2d 187 (C.A.D.C.), cert. den., 373 U.S. 913 (1963); Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P. 2d 732, 63 Cal. Rptr. 724 (1967); SEC v. Texas Gulf Sulphur Co., 446 F. 2d 1301 (C.A. 2), cert. den., 404 U.S. 1005 (1971). It is also well established that the States have the right to bring suits in numerous situations as parens patriae of the

citizens of those States. See Hawaii v. Standard Oil Co., 405 U.S. 251, 257-60 (1972) (citing cases). In those cases where the State may so maintain a damage action, the recovery necessarily must be determined on a collective basis and individual citizens of the State have no right to share in the damages, except to the entent that all citizens do. Title IV would change this latter aspect and it would overturn the other defect noted in the parens patriae effort turned back in Hawaii that the judgment would have had no res judicata effect, thus raising the possibility of double recovery. That would be resolved by Title IV. As to proof of damages, the title permits several methods and further leaves to the trial court discretion to specify still other forms if need be.

Congress' power to regulate economic behavior under the commerce clause is "broad and sweeping." Katzenbach v. McClung, 379 U.S. 294, 305 (1964). The standard for judging economic legislation under such general constitutional provisions as the due process clause is an extremely lenient one. "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). Cf. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423-425 (1952).

It is difficult, therefore, to foresee the basis for a successful constitutional attack upon this aspect of title IV. As applied, the title might in individual cases present significant constitutional problems that would not however, cast serious attack upon the facial validity of the section. If indeed

such occasions do arise, the "as applied" formula of constitutional adjudication presents Congress with the opportunity to refine its work as the necessity arises.

Johnny H. Killian
Assistant Chief

PROSPECTUS

FTC - S.E.C.
MAR 17 1975

$125,000,000

The Upjohn Company

8⅛% NOTES DUE 1985

Interest payable March 15 and September 15

The Notes may not be redeemed prior to March 15, 1982. On and after that date, the Notes may be redeemed at the option of the Company, in whole or in part, at their principal amount plus accrued interest.

Application will be made to list the Notes on the New York Stock Exchange.

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

PRICE 100% AND ACCRUED INTEREST

	Price to Public(1)	Underwriting Discounts and Commissions	Proceeds to Company(1)(2)
Per Unit	100.000%	.675%	99.325%
Total	$125,000,000	$843,750	$124,156,250

(1) Plus accrued interest from March 15, 1975.

(2) Before deducting expenses payable by the Company estimated at $235,000.

The Notes are offered by the several Underwriters named herein, subject to prior sale, when, as and if accepted by the Underwriters, and subject to approval of certain legal matters by Davis Polk & Wardwell, counsel for the Underwriters. It is expected that delivery of the Notes will be made on or about March 27, 1975 at the office of Morgan Stanley & Co. Incorporated, 140 Broadway, New York, N. Y., against payment therefor in New York funds.

MORGAN STANLEY & CO.
Incorporated

March 13, 1975

THE UPJOHN COMPANY AND SUBSIDIARIES

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

I. Planned Construction Expenditures:

Planned expenditures for construction and equipment for the year 1975 are $130,000,000.

J. Rental Expense and Commitments:

The Company and its subsidiaries have various leases for property and equipment, which generally require payment of specified amounts which are subject to escalation clauses, as well as additional amounts for taxes, insurance and other operating expenses. Certain of the leases are financing leases.

Minimum commitments under all noncapitalized, noncancellable leases as of December 31, 1974, are payable as follows (in thousands of dollars):

	All Leases	Financing Leases
1975	$ 6,664	$ 4,439
1976	4,019	2,504
1977	1,965	1,116
1978	1,632	991
1979	1,168	695
1980-1984	3,331	2,122
1985-1989	1,411	1,252
1990-1994	1,067	1,043
Remainder	2,900	2,900
Total	$24,157	$17,062

Of the total for all leases, $13,021,000 is applicable to land and buildings and the balance to equipment.

The effect upon net earnings, if noncapitalized financing leases were capitalized, would be less than 3% of the average net earnings for the years 1972 through 1974.

K. Litigation:

The Company together with certain other drug companies is a defendant in civil suits relating to broad spectrum antibiotic products. Pursuant to agreements by the defendants with certain claimants, the Company made litigation settlements (less related tax effect) of $841,000 and $1,021,000 in 1971 and 1973, which were charged to retained earnings.

The Company and certain other drug companies are defendants in an action relating to synthetic estrogen drugs, in which damages of $181 million are claimed.

The Company and certain other manufacturers and sellers of polyurethane foam are defendants in two civil suits. One suit, which asserts various antitrust and tort claims, seeks damages in excess of $750 million. The court has dismissed the complaint and the plaintiffs have appealed. The other suit, now in pretrial discovery stages, seeks damages of $56 million and $560 million in punitive damages.

While the final outcome of these suits and other related suits is uncertain, additional amounts to be paid, if any, should not have a material adverse effect on consolidated financial condition.

L. Stock Options:

Under an employee stock option plan adopted in 1972, options on 1,000,000 shares of the Company's common stock may be granted through December 31, 1976 at prices not less than the fair market value on the date of grant. The plan provides for five year qualified and ten year non-qualified options. Options are exercisable after one year of employment following date of grant to the extent of 25% per year. Optionees may be granted stock incentive rights to shares of common stock of the Company equal in market value to the amount by which the optioned shares' market value on the final date exercisable exceeds the option price. No stock incentive rights have been granted. Options on 486,540 and 10,050 shares were available

THE UPJOHN COMPANY AND SUBSIDIARIES

CONSOLIDATED BALANCE SHEET

December 31, 1974

ASSETS

	In Thousands of Dollars
Current assets:	
Cash (Note C)	$ 7,131
Interest bearing certificates of deposit and time deposits	13,215
Accounts receivable:	
Trade	159,623
Other	11,527
	171,150
Less allowance for doubtful accounts and cash discounts	3,447
	167,703
Inventories (Notes A and F):	
Pharmaceutical and chemical products	52,975
Seeds	26,420
Raw materials, work in process and supplies	95,478
	174,873
Other current assets	34,860
Total current assets	397,782
Property, plant and equipment (Note A):	
Land	15,132
Land improvements and utilities	23,291
Buildings	168,793
Equipment	209,701
Leasehold improvements	2,233
Construction in process	54,326
	473,476
Less allowance for depreciation	165,415
	308,061
Excess of cost over equity in net assets of businesses acquired, less accumulated amortization of $2,543,000 (Notes A and B)	5,612
Other noncurrent assets	7,363
	$718,818

The accompanying notes are an integral part of the financial statements.

SECURITIES AND EXCHANGE COMMISSION
RECEIVED
JUL 30 1973

PROSPECTUS

400,000 Shares

2-48499

GTE

GENERAL TELEPHONE COMPANY OF FLORIDA

8.16% Cumulative Preferred Stock

($100 Par Value)

Dividends cumulative from August 2, 1973, payable February 15, May 15, August 15 and November 15 in each year. Redeemable at the option of the Company at $108.16 per share through August 1, 1978, at $106.12 per share through August 1, 1983, at $104.08 per share through August 1, 1988 and at $102.04 per share thereafter, plus accrued dividends, provided that prior to August 1, 1978 redemption may not be made through certain refunding operations at an effective cost of money to the Company of less than 8.16% per annum.

Application will be made to list the New Preferred Stock on the New York Stock Exchange.

	Price to Public(1)	Underwriting Discounts and Commissions(2)	Proceeds to Company(3)
Per Share	$100.00	$1.10	$98.90
Total	$40,000,000	$440,000	$39,560,000

(1) Plus accrued dividends, if any, from date of original issuance.

(2) In the Purchase Agreement the Company has agreed to indemnify the Underwriters against certain liabilities, including liabilities under the Securities Act of 1933.

(3) After deducting underwriting commissions but before deduction of expenses payable by the Company estimated at $112,340.

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

Paine, Webber, Jackson & Curtis
Incorporated

Stone & Webster Securities Corporation

The date of this Prospectus is July 26, 1973.

In 1970 the telephone industry adopted certain changes with respect to procedures for the division of toll revenues. One of these changes was effective January 1, 1970, and another became effective July 1, 1970. These two changes increased toll revenues of the Company by approximately $6,500,000 on an annual basis of which $4,200,000 was received in 1970. A third change became effective January 1, 1971, and a reasonable approximation of the amount of additional toll revenues the Company received in 1971 from this change was $5,400,000.

Competition

The Company faces increasing competition with respect to its services. In May, 1971, the Federal Communications Commission issued a Report and Order which announced a new policy of allowing entry by new carriers into the interstate "specialized communications field" through the construction of facilities which would compete with existing common carrier systems in the provision of voice and data private line services and public switched network data services. Certain of the specialized common carrier applicants have filed for permission to construct facilities which will offer services in or adjacent to the operating territory of the Company and construction of several routes, none of which is in or adjacent to the operating territory of the Company, has been authorized. The Commission specifically provided that where such services may be in direct competition with existing common carrier services, departure from uniform nationwide pricing practices may be in order, and existing carriers may price their competitive services in a fashion that will realistically reflect any economic advantages they may have. It is not yet possible to determine the impact this decision may have on the Company.

In 1968 the Federal Communications Commission held that interstate tariff provisions which generally prohibited the attachment or connection of equipment, apparatus, circuits or devices not furnished by telephone companies with facilities furnished by telephone companies, were unlawful. Subsequently, revisions in interstate tariffs were filed and permitted to become effective. The revisions generally authorized the connection of customer-provided terminal equipment and customer-provided communications systems. Similar interconnection revisions have been made in the Company's intrastate tariffs. As directed by the Federal Communications Commission, its staff is holding informal conferences with the telephone industry, manufacturers, user groups and government agencies to ascertain what further changes in the tariffs relating to interconnection are necessary, desirable and technically feasible. A joint board of the Federal Communications Commission and the National Association of Regulatory Utility Commissioners has been appointed to consider further tariff changes. It is not possible to evaluate the impact any further changes may have on telephone revenues.

LITIGATION

In October, 1967, International Telephone and Telegraph Corporation ("ITT") filed a civil antitrust suit under Section 16 of the Clayton Act against GTE (owner of all of the Company's outstanding common stock) and Hawaiian Telephone Company (a wholly-owned subsidiary of GTE) in the United States District Court for the District of Hawaii, in which ITT attacked a number of GTE's acquisitions of telephone operating companies and telephone equipment manufacturing companies in the United States on the grounds that (a) such acquisitions violated Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act, (b) the acquisition of Hawaiian Telephone Company violated the Hawaiian antitrust laws, and (c) the United States acquisitions, together with GTE's vertical integration in Canada, violated Section 1 of the Sherman Act.

As described below, the acquisitions challenged by ITT represent a substantial part of the business and assets of GTE's subsidiaries. ITT seeks no money damages against GTE in this proceeding.

GTE filed a counterclaim against ITT under Section 16 of the Clayton Act (a) alleging that ITT has violated Section 1 of the Sherman Act and Section 7 of the Clayton Act (the same provisions relied on by ITT in its complaint), as well as Section 3 of the Sherman Act, through the vertical integration of its telecommunications business in the United States, and (b) asking for appropriate injunctive relief.

On July 14, 1972 the Trial Court handed down a decision finding that a number of GTE's acquisitions of telephone operating companies and telephone equipment manufacturing companies violated Section 7 of the Clayton Act, finding a violation of Section 1 of the Sherman Act arising out of said acquisitions and the subsequent actions and conduct of GTE and its subsidiaries in the purchase and sale of telephone equipment, finding that the acquisition of Hawaiian Telephone Company violated the Hawaiian antitrust laws, denying GTE any relief against ITT under the counterclaim filed by GTE, and stating that a decree would be entered at a future date.

On December 13, 1972, the Trial Court entered a decree, which would, if upheld on appeal, (a) require GTE to divest the United States and Canadian business operations and assets acquired in connection with its acquisition of GTE Automatic Electric Incorporated, GTE Lenkurt Incorporated and Leich Electric Company (the "Telephone Equipment Companies") within 18 months after all appeals are completed; (b) require GTE to divest Hawaiian Telephone Company within 2 years after all appeals are completed; (c) require GTE to divest the United States telephone company operations acquired in connection with its acquisition of Northern Ohio Telephone Company, the Western Utilities Group, Central Iowa Telephone Company, Peninsular Telephone Company (the former name of the Company) and the United States telephone operating assets of Theodore Gary And Company (which operations, as subsequently expanded, together with those of Hawaiian Telephone Company, involve in the aggregate approximately 40% of GTE's telephones in service in the United States), each to a separate purchaser, within 2 years after all appeals are completed or with the approval of the Court to make a substantially equivalent divestiture (as measured by telephones in service) in the form of presently organized GTE telephone operating subsidiaries; (d) require GTE, GTE Automatic Electric Incorporated and GTE Lenkurt Incorporated to grant, subject to payment of reasonable fees, licenses, technical information and manufacturing techniques with respect to certain of their products and processes; and (e) regulate the telecommunications business of GTE and its subsidiaries (whether or not divested) through injunctive provisions (i) prohibiting GTE from manufacturing non-military telephone equipment in the United States and Canada so long as GTE continues to own GTE Sylvania Incorporated, (ii) prohibiting GTE and its telephone operating company subsidiaries (whether or not divested), from becoming affiliated with United States or Canadian manufacturers of telephone equipment by acquisition, and (iii) prohibiting GTE and its subsidiaries from acquiring telephone operating companies without the consent of the Trial Court for a period of 10 years after the divestiture of the Telephone Equipment Companies.

It is the opinion of trial counsel for GTE, Hopkins, Sutter, Owen, Mulroy & Davis, and of special antitrust counsel for GTE, Kaye, Scholer, Fierman, Hays & Handler, that (a) there is no basis in the record before the Trial Court for a finding that GTE's acquisitions of telephone companies violate the antitrust laws in the absence of its vertical integration; (b) even if the findings of the Trial Court on the issues of liability were to be upheld on appeal, the relief which the Trial Court has granted is excessive since divestiture of telephone operating companies, in addition to divestiture of the Telephone Equipment Companies, is neither necessary nor appropriate to cure the effects of vertical integration which the Trial Court held to constitute a violation of the antitrust laws; and (c) thus the divestiture of telephone operating companies should not be affirmed on appeal.

On January 11, 1973, GTE filed a notice of appeal from the Trial Court's July 14, 1972 decision, certain pre-trial and post-trial rulings by the Trial Court, and the decree entered by the Trial Court on December 13, 1972.

The final disposition of the issues presented by the Hawaiian case might ultimately (a) have no effect on General Telephone Company of Florida (formerly Peninsular Telephone Company), which itself is not a defendant, (b) might cause GTE to compel the disposition of substantial elements of the Company's assets, (c) might cause GTE to dispose of all of the stock of the Company presently owned by GTE, or (d) might require substantial revision in the procedures whereby the Company acquires certain of its equipment.

On June 29, 1972, Manatee Cablevision Corporation ("MCV") filed a civil antitrust suit under Sections 1 and 2 of the Sherman Act and Sections 4 and 12 of the Clayton Act in the United States District Court for the Middle District of Florida against the Company, GTE, GTE Communications, Inc., and Florida Power and Light Corporation alleging violations of Sections 1 and 2 of the Sherman Act in connection with the use of poles, devices and other apparatus used in the distribution of communications common carrier services, broadband communications and power distribution. In its complaint MCV is asking for (a) treble damages in an aggregate amount in excess of $3,000,000 to the date of the complaint, (b) additional damages from the date of complaint in an amount to be determined by the Court and (c) costs of litigation and reasonable attorney's fees. On January 19, 1973, defendants answered the complaint generally denying the principal allegations thereof and filed a counterclaim against MCV and Richard S. Leghorn, President and Chairman of the Board of MCV, William E. Langendorf, Assistant Secretary and General Manager of MCV and Robert A. Wieland, Jr., Vice President and Treasurer of MCV, alleging violations of Sections 1 and 2 of the Sherman Act, violation of the Florida Antitrust Act and for fraud, interference with business relations and prospective economic advantage, breach of contract and conspiracy to violate legal rights. In their counterclaim, defendants are asking for (a) actual damages resulting from the violations of Florida law, (b) punitive damages of $400,000 for the violations of Florida law, (c) treble damages for the violations of Federal antitrust laws and (d) costs of litigation and reasonable attorney's fees.

MANAGEMENT

*George H. Gage	Director, President
George F. Baughman	Director
Sam F. Davis	Director
Phil Dross III	Director
*G. Richard Griffin	Director
*Fred D. Learey	Director
*P. Scott Linder	Director
*Hugh C. Macfarlane	Director
William H. Mills, Sr.	Director
Richard D. Pope, Jr.	Director
Edgar H. Price, Jr.	Director
Eugene L. Langley	Vice President—Operations
Raymond E. Dolar	Vice President and Controller
James F. Bell	Vice President and General Counsel
Robert L. Cromwell	Vice President—Public Affairs
Kenneth S. Durey	Vice President—Operations Staff
Robert L. Jones	Vice President—Personnel
Elwood N. Kohrman	Vice President—Government Affairs
Paul E. LeBlanc	Vice President—Area Development
W. A. McCullour	Vice President—Revenue Requirements
Victor Leavengood	Secretary and Treasurer

* Executive Committee Members

GENERAL TELEPHONE COMPANY OF FLORIDA

BALANCE SHEETS

ASSETS

	April 30, 1973 (Unaudited)	December 31, 1972
	(Thousands of Dollars)	
TELEPHONE PLANT (Note 3):		
Substantially at original cost	$891,259	$835,745
Accumulated depreciation	(146,913)	(138,300)
	744,346	697,445
CURRENT ASSETS:		
Cash	4,955	4,394
Accounts receivable—		
Customers and agents (including unbilled revenues)	23,823	22,821
Affiliated companies	1,061	678
Other	2,965	1,953
Allowance for uncollectible accounts	(740)	(700)
Materials and supplies, at average cost	11,528	11,019
Prepayments and other	633	1,111
	44,225	41,276
DEFERRED CHARGES:		
Cost of issuing debt securities, in process of amortization	1,084	1,140
Other	3,427	2,321
	4,511	3,461
	$793,082	$742,182

(The accompanying summary of significant accounting policies and notes are an integral part of these financial statements.)

2-54960

150,000 Shares

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

$9.52 Cumulative Preferred Stock

(Without Par Value)

The New Preferred Stock will be redeemable at the option of the Company prior to December 1, 1980 at $108.17 per share; thereafter and prior to December 1, 1985 at $105.00 per share; thereafter and prior to December 1, 1990 at $101.83 per share; and on or after December 1, 1990 at $98.65 per share, plus accrued dividends. However, prior to December 1, 1980, no redemption may be made through certain refunding operations at an effective cost of money to the Company of less than 9.75% per annum. A sinking fund will retire 6,000 shares at $100.00 a share on each December 1, commencing December 1, 1980.

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

	Price to Public(1)	*Underwriting Discounts and Commissions(2)*	*Proceeds to Company(3)(4)*
Per Share	$98.652	$1.027	$97.625
Total	$14,797,800	$154,050	$14,643,750

(1) Plus accrued dividends, if any, from date of issue.

(2) The Company has agreed to indemnify the several Purchasers against certain civil liabilities, including liabilities under the Securities Act of 1933.

(3) Before deducting expenses payable by the Company, estimated at $45,000.

(4) Up to $7,321,875 of the proceeds from the sale of up to 75,000 shares may not be received until January 29, 1976 (see "Delayed Delivery Contracts" herein).

Concurrent with this offering of 150,000 shares of $9.52 Cumulative Preferred Stock (without par value) there is being offered $45,000,000 of the Company's First Mortgage Bonds, 9⅞% Series Due 2005. The sales are separate transactions and are not contingent upon each other.

The New Preferred Stock is offered by the several Purchasers named herein subject to prior sale, when, as and if issued and accepted by them and subject to the approval of legal matters by counsel, and the Purchasers reserve the right, in their discretion, to reject any orders for the purchase of the New Preferred Stock, in whole or in part. It is expected that the New Preferred Stock will be ready for delivery on or about December 23, 1975, in New York City. In addition, portions of the New Preferred Stock may be offered to certain institutional investors by the Company through the several Purchasers pursuant to the delayed delivery contracts with the Company (see "Delayed Delivery Contracts" herein).

BLYTH EASTMAN DILLON & CO.
INCORPORATED

THE FIRST BOSTON CORPORATION

HALSEY, STUART & CO. INC.
AFFILIATE OF BACHE & CO. INCORPORATED

MERRILL LYNCH, PIERCE, FENNER & SMITH
INCORPORATED

SALOMON BROTHERS

The date of this Prospectus is December 10, 1975

The Company has requests for increased rates on file with 73 cities in the State of Texas, seeking increased local service revenues of approximately $3,881,000 on an annual basis. It is not presently possible to determine what action the appropriate regulatory bodies will take with respect to these requests for increased rates.

During 1970 the telephone industry adopted certain changes with respect to procedures for the division of toll revenues. On the basis of 1971 toll volumes the Company believes that a reasonable approximation of additional toll revenues received from these changes is $1,300,000 on an annual basis.

Effective March 9, 1975 the FCC authorized American Telephone and Telegraph Company to increase interstate toll rates. Effective August 12, 1975, the Austin District Court (Texas) authorized the Southwestern Bell Telephone Company to increase intrastate toll rates in Texas and on September 5, 1975, the Arkansas Public Service Commission authorized Southwestern Bell Telephone Company to increase intrastate toll rates in Arkansas. The Company is a concurring party in the toll increases and is receiving additional revenues therefrom, however, it is not presently possible to determine the annual effect of such toll increases on the Company's revenues.

Competition

The Company faces increasing competition with respect to its services. In accordance with an FCC policy, certain specialized common carriers have been licensed and are offering voice and data private line services and public switched network data services in or adjacent to the operating territories of the Company. The FCC specifically provided that where such services may be in direct competition with existing common carrier services, existing carriers may be permitted to price their competitive services to reflect any economic advantages they may have.

In compliance with an order of the FCC, interstate tariffs were revised to authorize the connection of customer-provided terminal equipment and communications systems with facilities furnished by telephone companies. Similar interconnection revisions have been made in the Company's intrastate tariffs. A joint board of the FCC and the National Association of Regulatory Utility Commissioners has directed that interstate tariffs be revised to permit connection of (a) registered equipment and (b) certain unregistered equipment through registered protective circuitry. Several states are investigating the impact of interconnection and the FCC is currently seeking to determine what economic implications and inter-relationships have arisen from policies and practices relating to customer interconnection, jurisdictional separations and rate structures. It is not possible to evaluate the impact which these ongoing proceedings may have on the Company's revenues. Thus far the activities of competitors have had no material impact on the revenues of the Company.

Energy Shortage

The ultimate effect of the current energy shortage on the economy as a whole and hence on the Company's business is uncertain at this time. To date, the impact has not been material. The Company has an ongoing program to conserve energy. Included in this program are measures to reduce lighting, heating, air conditioning and the use of the Company's vehicles to minimum needs consistent with safety and security.

LITIGATION

In October, 1967, International Telephone and Telegraph Corporation ("ITT") commenced an antitrust suit under Section 16 of the Clayton Act and the Hawaii antitrust law against GTE and Hawaiian Telephone Company (a wholly-owned subsidiary of GTE) in the United States District Court for the District of Hawaii, alleging that certain acquisitions and accompanying trade practices violated the federal and state antitrust laws.

The District Court decided that GTE's acquisitions of telephone equipment manufacturing companies and some domestic telephone operating companies, as well as certain equipment procurement practices of GTE's domestic telephone operating companies, were illegal and entered a judgment directing GTE to

divest itself of (a) its North American telephone equipment manufacturing subsidiaries, and (b) certain domestic telephone operations, involving in the aggregate approximately 40% of GTE's telephones in service in the United States. The District Court's judgment also (a) contained restrictions with respect to future acquisitions of telephone operating companies and telephone equipment manufacturing companies by GTE and its manufacture of such equipment, and (b) required mandatory licensing with respect to certain of the products and processes of GTE's telephone equipment manufacturing companies.

On April 25, 1975, the United States Court of Appeals for the Ninth Circuit entered a decision reversing in part and affirming in part the judgment of the District Court. The Court of Appeals ruled that divestiture is not an available remedy in private antitrust actions, and that, in finding that GTE had violated the antitrust laws, the District Court had erred in defining the relevant market for telephone equipment manufacturing companies as including only non-Bell telephone operating companies and also in failing to make separate findings with respect to the legality of each challenged acquisition. The appellate court therefore remanded the case to the District Court to reconsider the matter, applying guidelines provided by the appellate court, and determine whether there actually was a violation of the antitrust laws. If, after reconsideration, the District Court again decides a violation has occurred, it is directed by the Court of Appeals to determine what injunctive relief is appropriate, not including divestiture or its equivalent, to prevent a recurrence of the violation.

DESCRIPTION OF THE NEW BONDS

The New Bonds are to be issued as a new series of the Company's First Mortgage Bonds (the "Bonds") under an Indenture dated June 1, 1940 and twenty-six supplemental indentures thereto, including a supplemental indenture dated as of December 1, 1975 (the "New Supplemental Indenture"), between the Company and First National Bank in Dallas, Trustee (the "Trustee"). Said indenture and the indentures supplemental thereto are exhibits to the Registration Statement and are hereinafter collectively called the "Indenture".

The summary below does not purport to be complete and is subject in all respects to the provisions of and is qualified in its entirety by express reference to the cited Articles and Sections of the Indenture and to the definitions therein of terms used herein.

Maturity, Interest and Payment

The New Bonds will mature December 1, 2005 and interest will be payable semi-annually on June 1 and December 1 to the persons in whose names the New Bonds are registered at the close of business on the May 15 or November 15 preceding such interest payment date, subject to certain exceptions provided for in the New Supplemental Indenture. The New Bonds are to be issuable in registered form only in denominations of $1,000 and multiples thereof and will be exchangeable for New Bonds of other denominations of a like aggregate principal amount without charge except for reimbursement of taxes, if any. (New Supplemental Indenture).

Redemption Provisions

The New Bonds will be redeemable upon not less than 30 days' notice at the redemption prices referred to hereafter under "Redemption Prices of New Bonds". Redemption is not permitted prior to December 1, 1980, if such redemption is for the purpose or in anticipation of refunding any of the New Bonds by the application, directly or indirectly, of funds borrowed by the Company at an interest cost less than the interest cost on the New Bonds. (New Supplemental Indenture).

Security and Priority

In the opinion of counsel for the Company, the New Bonds, when issued and sold, will be secured equally with all other Bonds, by a valid first lien on all property now owned or hereafter acquired by the Company, subject to Excepted Encumbrances and Prior Liens, and excluding certain property excepted

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

BALANCE SHEETS

ASSETS

	September 30, 1975 (Unaudited)	December 31, 1974
	(Thousands of Dollars)	
TELEPHONE PLANT (Note 4):		
Original cost	$892,491	$836,743
Accumulated depreciation	(171,557)	(150,808)
	720,934	685,935
INVESTMENTS AND OTHER ASSETS, at cost	1,001	3,063
CURRENT ASSETS:		
Cash (Note 5)	2,753	5,585
Accounts receivable—		
Customers (including unbilled revenues)	21,974	20,458
Affiliated companies	434	738
Other	1,072	934
Allowance for doubtful accounts	(337)	(293)
Material and supplies, at average cost	5,298	4,147
Prepayments and other	1,607	1,256
	32,801	32,825
DEFERRED CHARGES:		
Cost of issuing debt securities, in process of amortization	798	818
Other, including business information systems development costs (Note 7)	3,765	2,537
	4,563	3,355
	$759,299	$725,178

(The accompanying summary of significant accounting policies and notes are an integral part of these financial statements.)

2-52638

REC'D S.E.C.
FEB 18 1975

Esmark, Inc.

$75,000,000 9¼% Sinking Fund Debentures due February 1, 2000
$50,000,000 8.40% Notes due February 1, 1982

The Debentures are redeemable at the Company's option at any time at declining premiums, in whole or in part, but are not redeemable prior to February 1, 1985 as a part of any refunding involving borrowings at an interest cost of less than 9.30% per annum. The Debentures will be entitled to a sinking fund commencing February 1, 1981 in annual installments of $3,750,000 (which may be increased by the Company to $7,500,000), calculated to retire at least 95% of the Debentures prior to maturity. See "Description of Debentures."

The Notes will be redeemable, in whole or in part, at 100% at the Company's option at any time on or after February 1, 1981, and will not be entitled to any sinking fund. See "Description of Notes."

The Company intends to make application for listing the Debentures and the Notes on the New York Stock Exchange.

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

	Initial Public Offering Price(1)	Underwriting Discounts and Commissions(2)	Proceeds(3)
Debentures:			
Per Debenture	99.50%	.875%	98.625%
Total	$74,625,000	$656,250	$73, 968,750
Notes:			
Per Note	100%	.700%	99.300%
Total	$50,000,000	$350,000	$49,650,000

(1) Plus accrued interest from February 1, 1975.
(2) The Company has agreed to indemnify the Underwriters against certain liabilities, including liabilities under the Securities Act of 1933.
(3) The proceeds are stated before deduction of expenses payable by the Company, estimated at $260,000.

The Debentures and Notes are offered severally by underwriters as specified herein, subject to receipt and acceptance by them and subject to the right to reject any order in whole or in part. In addition, the Debentures are being offered at the initial public offering price on behalf of the Company to certain institutions by the several underwriters as described under "Delayed Delivery Arrangements" herein. It is expected that the Debentures and Notes will be ready for delivery in definitive form at the office of Goldman, Sachs & Co., New York, New York on or about February 13, 1975, and that Debentures purchased from the Company for delayed delivery will be delivered on July 16, 1975. The Debentures and the Notes will be issued only in fully registered form.

Goldman, Sachs & Co. **Salomon Brothers**

The date of this Prospectus is February 6, 1975

Litigation

Esmark or its subsidiaries are parties to a number of legal actions, including (a) a consolidated action (including purported class claims), first filed in 1971, in the Federal District Court in New York City by the City of New York, nine corporate and four other plaintiffs against the then major factors in the rendering business in the New York Metropolitan area including Swift and certain individuals (including Swift's former manager) in which treble damages of an unspecified amount are sought for alleged violations of the antitrust laws in the rendering business in the New York Metropolitan area in certain prior years; (b) an action filed in 1972 in the Federal District Court in Chicago against Swift by Security Mutual Casualty Company alleging that in certain prior years Swift violated (i) the antitrust laws, (ii) through various acts the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)5 thereunder, and (iii) its fiduciary duties to the plaintiff, its minority policy holders and non-member insureds, and claiming damages in excess of $357,000,000 (including treble damages); and (c) three purported class actions filed in 1974 in the Federal District Courts in Chicago and New Orleans and the Delaware Chancery Court in Wilmington in connection with the September 30, 1974 tender offer by Vickers to the stockholders of TransOcean alleging in one or more of said cases (i) violations of the antimanipulative, antifraud, registration and take-over provisions of the federal securities laws and of the federal antitrust laws, (ii) violations of various state antitrust laws and the securities and Blue Sky laws of Louisiana and other states where members of the alleged class reside and (iii) breach of fiduciary obligations to the minority stockholders of TransOcean and seeking various relief, including rescission and damages: one of these actions includes a derivative count with respect to dealings between TransOcean and certain subsidiaries of the Company (and joins all but one of the directors of the Company as defendants). There has been substantial discovery in the actions referred to at (a) and (b) above and a trial date has been tentatively set for March 1975 in the action referred to at (b) above. The actions referred to at (c) are in preliminary stages except for the Wilmington case which is set for trial beginning April 7, 1975. Although the ultimate liabilities, if any, which may result from legal actions against the Company cannot be determined at this time, in the opinion of Scott E. Bohon, Vice President and General Counsel of the Company, any such liabilities or any other relief that might be granted under any judgment will not have a materially adverse effect on the Company's consolidated financial position, nor have a substantial effect upon its earnings.

Presently pending are nine judicial and administrative proceedings relating to compliance with laws and regulations relating to the alleged discharge of materials into the environment or otherwise relating to the protection thereof. In management's opinion none of such proceedings, nor all taken as a group, will have a substantial effect upon the earnings or financial position of the Company. The principal proceedings involve the Swift Chemical fertilizer mixing plant at Winterhaven, Florida and the Swift edible oil refinery at Bradley, Illinois.

Since 1920 Swift and three other meat packers have been subject to the restrictions of the so-called Packers Consent Decree. The Decree, as modified in 1971 and in 1975, continues to impose restraints on (a) owning or operating retail meat markets; (b) transporting or selling at retail of about 100 non-meat grocery items; (c) the ownership of public cold storage warehouses; and (d) entry into the business of manufacturing, and/or wholesale distribution of the prohibited products, except by internal expansion or limited acquisition.

Press reports indicate that the Antitrust Division of the Department of Justice plans to investigate various industries, and has begun an investigation of the potash industry and the

phosphate industry. On January 23, 1975 the Company received a subpoena from a Federal Grand Jury in Chicago requesting documents relating to potash. In management's opinion the Company's operations have not violated the antitrust laws.

Employment and Labor Relations

The average number of employes of the Company during the last fiscal year was 33,500. Labor relations are considered good. The operating companies and divisions have some 250 collective bargaining agreements. The principal contracts are two national agreements covering production and maintenance employes at meat packing plants. These contracts with the Amalgamated Meat Cutters and Butcher Workmen of America, AFL-CIO, and the National Brotherhood of Packinghouse Workers are for a three-year period ending September 1, 1976.

Miscellaneous

The Company has a continuing program of examining diversification opportunities. On January 23, 1975, the Company and Doric Corporation of Oklahoma City announced a proposal for the acquisition of Doric by Esmark on the basis of .46 share of Esmark Common Stock for each Doric share, involving 922,741 Esmark shares. Doric's principal lines of business (conducted through divisions and subsidiaries) are the sale of dental equipment and supplies, oil and gas operations, the manufacture and sale of pet food and the production of specialty chemicals and metals. Preliminary Doric figures for the year ended December 31, 1974 indicate revenues of approximately $95,000,000 with net earnings of about $5,300,000 ($3,500,000 in 1973 and $2,800,000 in 1972). As of that date, it had total assets of $65,000,000, long-term debt (exclusive of current maturities) of $18,000,000 and stockholders' equity of $35,400,000 (all approximate). Completion of the acquisition (following a Doric stockholders' meeting) would not have a material effect on the coverage of interest on the securities offered hereby, or revenues, net earnings or financial position of the Company. There is no assurance that this acquisition will be completed.

PROPERTIES

The principal domestic plants and mines and the other materially important physical properties of Esmark's operating subsidiaries are set forth below.

Foods	*Number of Plants*		
	Owned	*Leased**	*Expiration Dates of Leases*
Fresh meats (primarily beef, pork and/or lamb)	13	6	1978 to 1989
Edible oil refineries	4**		
Soybean oil mills	4		
Poultry plants and feed mills	19	7	1975 to 1983 (5 with renewal options)
Dairy plants (primarily cheese and ice cream)	11	5	1975 to 1992 (3 with renewal options)
Processed meats	6		
Grocery products—			
Canned hams	1		
Peanut butter	1		

*Leases relating to six of these plants have been treated as lease-purchases for financial reporting purposes and, accordingly, have been capitalized.

**One of these refineries (located in Los Angeles) will be closed in April 1975.

ESMARK, INC.

CONSOLIDATED STATEMENT OF FINANCIAL POSITION

ASSETS

	Oct. 26, 1974 (In thousands of dollars)
Current assets:	
Cash (Note 3)	$ 1,359
Temporary investments (Note 3)	29,792
Receivables, primarily trade, less allowances of $4,244	262,450
Inventories (Notes 2c and 4)	387,268
Prepayments and other current assets—	
Deferred income taxes (Note 2f)	7,889
Other	6,383
Total current assets	695,141
Investments and other assets (Notes 2d and 5):	
Investments in and advances to—	
Nonconsolidated subsidiaries	14,933
Affiliated companies	12,780
Long-term receivables	4,617
Other assets	15,560
Total investments and other assets	47,890
Property and operating facilities (Notes 2e and 6)	501,153
Excess of cost over net assets of purchased businesses (Note 2a)	21,959
	$1,266,143

See accompanying notes.

PARENS PATRIAE IN ANTITRUST: A BLESSING FOR THE CONSUMER OR AN AFFRONT TO THE FOURTEENTH AMENDMENT?

*By Patricia E. Cole**

The well-worn adage, *caveat emptor*, once looked upon as the cornerstone of the business world, is being replaced today by a concept of consumer protection based upon stringent statutes and governmental enforcement. Accordingly, a bill[1] was introduced in the House of Representatives which would, if passed, authorize state attorneys general to bring treble-damage antitrust actions as *parens patriae* on behalf of their states' economically injured citizens. This note concerns the question of whether a *parens patriae* suit brought under this legislation would violate the due process rights of those injured citizens by usurping their cause of action.

When the antitrust laws have been violated resulting in an economic injury to a large number of citizen-consumers in a state, this bill authorizes the state attorney general to proceed on their behalf to recover treble damages. Nothing in the bill provides for notifying the consumers that their cause of action is being pursued or even that they have a cause of action. The bill allows for neither participation in the suit by an individual nor an opportunity to withdraw and pursue a separate remedy. The recovery, as envisioned by the bill, would be based on the defendants' records rather than on the claims of each injured citizen. In this way the entire amount of the overcharge, trebled, would be recovered, leaving the defendants free from further liability. Therefore, the suit brought by the attorney general necessarily includes the cause of action of every injured citizen in the state.

The courts have recognized that a cause of action is a vested property right protected by the Fifth and Fourteenth Amendments.[2] As such, it cannot be taken from a citizen without due process of law. The focus of this note is whether this *parens patriae* legislation provides that due process for the individual citizen.

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* Member, third year class.

1. H.R. 12921, 93d Cong. 2d Sess. (1974).

2. *See, e.g.*, Coombes v. Getz, 285 U.S. 434, 448 (1932); Edwardsen v. Morton, 369 F. Supp. 1359, 1376 (D.D.C. 1973).

It is necessary to begin by exploring the evolution of the concept of *parens patriae* from its common law roots in England to its looming potential as a highly effective weapon in the arsenal of antitrust enforcement. The relative ineffectiveness of present methods of antitrust enforcement, including class actions and government criminal and injunctive suits, will be considered.

Next the background of the due process requirement of notice will be analyzed. Notice has always been regarded as an important aspect of due process because it ensures that the individual's interest will be adequately represented by informing him of any proceeding in which that interest is involved. Then he may decide whether to participate in the proceeding or let others represent his interests. But the history of the notice requirement reveals that the individual's interest in receiving individual notice and the value of the rights involved must be balanced against the difficulty of sending out individual notice. In a *parens patriae* suit to recover for a widespread consumer injury, an individual's interest in receiving notice and the value of his claim would be small, while the state's interest in bringing the action to deter future violations and to provide the consumer with some method for recovering damages would be great. The economic reality is that if a state had to send out individual notice to every consumer in the state, very few actions would be brought, and the cause of action would, in all probability, be lost to the consumer. The overriding need for *parens patriae* legislation which would enable large-scale consumer antitrust actions to be brought by the state attorney general far outweighs the potential problems that may arise.

Historical Development of Parens Patriae

The concept of *parens patriae* is not new. In early English common law, the king, as "father of the country," had the power to act as guardian of persons under legal disabilities to act for themselves. Blackstone refers to the sovereign or his representative as the "general guardian of all infants, idiots, and lunatics," and as the superintendent of "all charitable uses in the kingdom."[3] *Parens patriae* suits recognize that the law should not permit one person to injure another with impunity merely because the injured person is unable to appear in court.

Three important elements of the original concept of *parens patriae* should be noted: 1) it is a common law doctrine and therefore subject to expansion and development; 2) it is an interstitial doctrine designed to fill a gap in the law; and 3) the *parens patriae* actions were not brought on behalf of the sovereign, but by the sovereign on behalf of the injured persons.

3. 3 W. Blackstone, Commentaries *47.

In the United States, the *parens patriae* function of the king passed to the states.[4]

Early Parens Patriae Cases

The nature and scope of *parens patriae* has been greatly expanded in this country to permit a state to sue when a large number of its citizens is threatened with injury, and the injured citizens are unable to protect their own interests because of the number of people affected and the often complex nature of the problem. This expansion is reflected in a number of cases decided early in this century.[5] These cases were brought under Article III section 2 of the Constitution which provides for the original jurisdiction of the Supreme Court in any case in which a state is suing on its own behalf.[6]

In *Louisiana v. Texas*,[7] the state of Louisiana "presented herself in the attitude of *parens patriae*, trustee, guardian or representative of all her citizens"[8] in a suit to enjoin Texas from so administering its quarantine regulations as to prevent Louisiana merchants from sending goods into or through Texas. The lack of an independent interest in the property of its citizens did not prevent Louisiana from bringing a *parens patriae* claim but merely denied it the original jurisdiction of the Supreme Court to hear that claim because the suit was not brought on the state's own behalf. The propriety and utility of *parens patriae* suits based on an injury to the public at large were clearly recognized in this case.[9]

In *Missouri v. Illinois*,[10] a suit to enjoin the discharge of sewage into the Mississippi River by a Chicago sanitation district, Judge Shiras upheld Missouri's standing to sue, stating "it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and to defend them."[11]

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4. Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972).

5. North Dakota v. Minnesota, 263 U.S. 365 (1923); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); New York v. New Jersey, 256 U.S. 296 (1921); Kansas v. Colorado, 206 U.S. 46 (1907); Missouri v. Illinois, 180 U.S. 208 (1901); Louisiana v. Texas, 176 U.S. 1 (1900).

6. "In all cases . . . in which a State shall be a party, the Supreme Court shall have original jurisdiction." U.S. CONST. art. III, § 2. This provision was viewed as a substitute for the war- and treaty-making powers which were lost to the states when they joined the Union. It was felt that through litigation in the Supreme Court, a state would be able to protect the interests of its citizens as it had through wars and treaties in the past. *See* Missouri v. Illinois, 180 U.S. 208, 241 (1901); Louisiana v. Texas, 176 U.S. 1, 27 (Brown J., concurring) (1900).

7. 176 U.S. 1 (1900).

8. *Id.* at 19.

9. *Id.; see* Hawaii v. Standard Oil Co., 405 U.S. 251, 258 (1972).

10. 180 U.S. 208 (1901).

11. *Id.* at 241.

But the Court had an even more compelling interest to consider: "[T]he nature of the injury complained of is such that an adequate remedy *can only be found* in this court at the suit of the State of Missouri."[12] Though this case was primarily concerned with a state's power to protect the "health and comfort" of its citizens, it serves also as an example of the flexible powers of the Court in applying the common law doctrine of *parens patriae* to achieve an equitable result.

Georgia v. Tennessee Copper Co.[13] was not a *parens patriae* case, but its holding has often been erroneously invoked as a standard for *parens patriae* actions. Georgia was suing neither in its sovereign capacity to protect its property nor in its *parens patriae* capacity to protect the property of its citizens, but in its "quasi-sovereign" capacity to protect its residual interest in the property within its borders. For this reason the Court required "an interest independent of and behind the titles of its citizens" in order to show the requisite state interest to invoke the original jurisdiction of the Supreme Court. Justice Holmes described the capacity in which the state was suing as follows:

> The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power.[14]

Although there is little similarity between a "quasi-sovereign" suit and a *parens patriae* suit,[15] the idea that a state needs "an interest independent of and behind the titles of its citizens" is one which has been erroneously applied in *parens patriae* suits brought since the *Georgia*

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12. *Id.* (emphasis added).

13. 206 U.S. 230 (1907).

14. *Id.* at 237.

15. A "quasi-sovereign" suit is a suit brought by a state on its own behalf to protect its residual interest in all the land in the state; a *parens patriae* suit is also brought by the state, but its purpose is to protect the state's citizens from economic injury to their land, business or welfare. The difference is in both the purpose of the suit and the type of injury which may cause the suit to be brought. The procedural differences between the two require that in a "quasi-sovereign" suit the state must have "an interest independent of and behind the titles of its citizens" in order to have standing to bring the suit at all. In a *parens patriae* suit there need only be a large number of the state's citizens who are economically injured for the state to have standing to sue on their behalf.

case.[16] Nothing in *Georgia* would indicate that the state intended to sue as *parens patriae*, nor that the independent interest test should apply to a *parens patriae* suit.

Legal Elements of Parens Patriae

Some commentators are of the opinion that a state as *parens patriae* "cannot sue merely to promote the *individual* interests of some—or even all—of its citizens."[17] Justice Clarke, reporting the opinion of the Court in *New York v. New Jersey*,[18] seems to answer this in his statement: "The health, comfort and prosperity of the people of the State and the value of their property being gravely menaced . . . the State is the proper party to represent and defend such rights . . . ."[19]

The nexus in the *parens patriae* suits discussed above is that a large number of the state's citizens were injured, or threatened with injury, and were unable to protect their own interests because of the number of people affected and the often complex nature of the problem. The courts permitted these suits even though the persons represented were technically competent to bring their own suits, and even though there was no direct injury to any proprietary interest of the state.

Parens Patriae in Antitrust Suits

Georgia v. Pennsylvania Railroad Co.[20] was the first case in which a state sued for injunctive relief and damages under the federal antitrust laws. The state of Georgia filed a complaint against twenty railroads, alleging that they had conspired to restrain trade and to fix prices to the detriment of Georgia shippers. The Court held, in a five-to-four decision, that Georgia, as *parens patriae*, had the right to sue for an injunction under the antitrust laws.[21] In discussing the propriety of such a suit, Justice Douglas stated:

> [W]e find no indication that, when Congress fashioned those civil [antitrust] remedies, it restricted the States to suits to protect their

16. *See, e.g.*, Hawaii v. Standard Oil Co., 405 U.S. 251, 258 (1972); Pennsylvania v. West Virginia, 262 U.S. 553, 591-92 (1923) (suit to enjoin West Virginia's interference with the flow of natural gas).

17. *See, e.g.*, Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U.L. REV. 193, 209 (1970) (emphasis in original).

18. 256 U.S. 296 (1921) (suit to enjoin the discharge of sewage into New York Harbor).

19. *Id.* at 301-02.

20. 324 U.S. 439 (1945).

21. The only apparent reason for the Court's eventual denial of Georgia's damage claim was the holding in Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1922), which stated that once rates were approved by the Interstate Commerce Commission, refunds of any part of the rate would constitute an illegal rebate. *Id.* at 453.

> proprietary interests. Suits by a State, *parens patriae*, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts.[22]

There was a strong dissent by Chief Justice Stone in this case, based on his belief (shared by Justices Frankfurter, Jackson and Roberts) that Georgia's citizens could prosecute their own suits, and therefore the state did not have standing to bring the action.[23] Chief Justice Stone seems to have ignored the previous decisions authorizing a state to bring suit *parens patriae* when a large number of its citizens have been injured. In addition, the economic injury to Georgia's citizens was an economic injury to the entire state. As Justice Douglas wrote, "The rights which Georgia asserts, *parens patriae*, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia."[24]

The *Georgia* case stands for the proposition that a state can bring a *parens patriae* suit under the federal antitrust laws for injury to its citizens and for injury to its economy. Although the Court did not specifically deal with the question of damages, implicit in the opinion is the assumption that, under different circumstances, damages would be awarded under the antitrust laws.[25]

Two Recent Cases

Within the last five years there have been two significant cases dealing with the question of the applicability of *parens patriae* suits to antitrust violations. In *Hawaii v. Standard Oil Co.*,[26] the state of Hawaii filed suit against four oil companies, charging them with violation of section 1 of the Sherman Act[27] by entering into unlawful contracts, conspiring and combining to restrain trade and commerce in the sale, marketing and distribution of refined petroleum products, and attempt-

22. *Id.* at 447.
23. *Id.* at 473.
24. *Id.* at 447.
25. *Id.* at 453. As Chief Judge Pence concluded in the district court opinion in the Standard Oil case: "Absent the impact of the *Keogh* decision, the only rational inference to be drawn from *Georgia v. Pennsylvania R.R.*, is that an antitrust suit for treble damages was properly pled by Georgia in its *parens patriae* capacity. Certainly the broad objectives of the antitrust statutes are not to be meanly or narrowly curtailed because it is a state that brings a damage claim thereunder, in a *parens patriae* capacity." Hawaii v. Standard Oil Co., 301 F. Supp. 982, 987 (D. Hawaii 1969), *rev'd*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972). Justice Brennan in his dissent from the Supreme Court opinion in the *Hawaii* case stated: "Implicit in the decision, however, was the holding that Georgia, as *parens patriae*, could have recovered damages under the antitrust laws for a conspiracy involving other than agency-approved transportation charges." Hawaii v. Standard Oil Co., 405 U.S. 251, 272 (1972).
26. 405 U.S. 251 (1972).
27. 15 U.S.C. § 1 (1970).

ing to monopolize and actually monopolizing that trade and commerce.[28] Hawaii sought recovery in three separate capacities: in its proprietary capacity for overcharges on petroleum products which were purchased by the state itself, as *parens patriae* to recover for injuries to the general economy of the state, and as a class representative for all purchasers of petroleum products in the state.[29] The district court dismissed the class action claim as unmanageable, but retained the *parens patriae* claim.[30] The Ninth Circuit reversed the decision of the district court and directed that the *parens patriae* count also be dismissed.[31] The Supreme Court granted certiorari.[32]

The issue as described by the Court was "not whether Hawaii may maintain its lawsuit on behalf of its citizens, but rather whether the injury for which it seeks to recover is compensable under § 4 of the Clayton Act. Hence, Hawaii's claim cannot be resolved simply by reference to any general principles governing *parens patriae* actions."[33] Section 4 of the Clayton Act reads as follows:

> Any person who shall be injured in his *business or property* by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.[34]

The Court decided that this section did not cover Hawaii's injury, because damage to the state's general economy is not an injury to its "business or property" within the meaning of the act. But the Court did say that "Hawaii plainly qualifies as a person under . . . the statute, whether it sues in its proprietary capacity or as *parens patriae*."[35]

The Court expressed the opinion that if Congress had intended the antitrust laws to cover damage to a state's general economy, it

28. Hawaii v. Standard Oil Co., 405 U.S. 251, 253 (1972).

29. *Id.* at 254-55. The state also sought recovery as *parens patriae* for all purchasers in the state, but this count was dismissed by the district court, and Hawaii replaced it with the count for damages for harm done to the economy of the state. However, the philosophy of the original count was still present when the counsel for Hawaii, in oral argument, suggested that recovery by the state could benefit the injured consumers in one of two ways: 1) the citizens would benefit from reduced taxation if the state retained the funds recovered, or 2) injured citizens would be able to recover their specific claims out of the funds recovered by the state. 40 U.S.L.W. at 3189 (Oct. 26, 1971); *see* Comment, *Hawaii v. Standard Oil Co.: Aloha to Parens Patriae?*, 22 CATHOLIC U.L. REV. 156, 158 (1972).

30. 301 F. Supp. 982 (D. Hawaii 1969).

31. 431 F.2d 1282 (9th Cir. 1970).

32. 401 U.S. 936 (1971).

33. Hawaii v. Standard Oil Co., 405 U.S. 251, 259 (1972).

34. 15 U.S.C. § 15 (1970) (emphasis added).

35. 405 U.S. at 261-62 (1972).

would have expressly provided for it.[36] This view, however, ignores the very nature of the antitrust laws, which were purposely written as broadly as possible to allow for situations not foreseen at the time of drafting.[37]

The other concern of the Court was that since under the antitrust laws each citizen could recover for individual damages, allowing Hawaii to recover for damage to the general economy would be opening "the door to duplicative recoveries."[38] However, in this case such a result hardly seems likely. The district court had denied Hawaii's count as representative of a class of injured consumers, finding that "under the circumstances . . . the class action based upon injury to every individual purchaser of gasoline in the State . . . in the context of the pleadings, would be unmanageable."[39]

The most recent opinion on the applicability of *parens patriae* to an antitrust treble damage action is the Ninth Circuit decision in *California v. Frito-Lay Inc.*[40] In this action California sought to recover treble damages for an alleged conspiracy by twelve manufacturers of "snack food" to fix and maintain prices in violation of section 1 of the Sherman Act. The state's second cause of action reads as follows:

> The State of California, as sovereign, agent and protector of all its citizens, sues *parens patriae* as representative of its citizens who are natural persons and who have not sued in their own right. This action is brought for treble the amount of damages suffered by its citizens due to the defendants' violations of the antitrust laws of the United States. It is impractical or impossible for the citizens represented herein to bring individual suits to recover damages and the duty to protect their interests and to enforce the policy of the antitrust laws rests with their sovereign, the State of California.[41]

The district court had denied defendants' motion to dismiss this cause of action stating:

> Courts cannot shrink from the responsibility of providing a forum for litigating claimed violations of rights—private or public—just because it has never been done before. *Parens patriae* in this representative sense meets both the letter and the spirit of Section 4 of the Clayton Act. This Court has been presented no valid reason why California, insofar as it purports to represent citizens for

36. "At the very least, if the latter type of injury is to be compensable under the antitrust laws, we should insist upon a clear expression of a congressional purpose to make it so, and no such expression is to be found in § 4 of the Clayton Act." *Id.* at 264.

37. *See* 21 CONG. REC. 2460 (1890) (remarks of Senator Sherman): "All that we, as lawmakers, can do is to declare general principles . . . ." *See generally*, P. AREEDA, ANTITRUST ANALYSIS (2d ed. 1974).

38. 405 U.S. at 264.

39. *Id.* at 256.

40. 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973).

41. 474 F.2d at 775.

> whom it is impractical or impossible to bring individual suits to recover damages for violation of the antitrust laws, should not be given the opportunity to do so.[42]

The Ninth Circuit reversed on the ground that *parens patriae* had not been recognized in this country as a basis for recovery of money damages for injuries suffered by individuals; but it indicated that such recognition might be in the offing.

> It would indeed appear that the state is on the track of a suitable answer (perhaps the most suitable yet proposed) to problems bearing on antitrust deterrence and the class action as a means of consumer protection. We disclaim any intent to discourage the state in its search for a solution.
>
> However, if the state is to be empowered to act in the fashion here sought we feel that authority must come not through judicial improvisation but by legislation and rule making, where careful consideration can be given to the conditions and procedures that will suffice to meet the many problems posed by one's assertion of power to deal with another's property and to commit him to actions taken in his behalf.[43]

Both these recent cases denied the state standing to bring a *parens patriae* suit for damages to either the state's general economy or the state's individual citizen-consumers because the courts have interpreted the antitrust laws, and particularly the private action section of the Clayton Act, as not permitting this type of suit. In *Hawaii* the Court interpreted the "business and property" requirement of the act as failing to cover damages to the "general economy"; and in *California* the Court believed that for a state to recover the damages of its injured citizens, a specific legislative sanction was necessary, something which it did not find in the present antitrust laws. The opinions in each case indicate a potential acceptance of legislation that would allow these suits.[44] Accordingly, Congressman Peter Rodino, chairman of the House Committee on the Judiciary, introduced his proposed amendment to section 4 of the Clayton Act.

Legislative Solution

On February 20, 1974, Congressman Rodino, for himself, Congresswoman Jordan, and Congressmen Mezvinsky and Seiberling, introduced H.R. 12921 on the floor of the House of Representatives.[45]

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42. California v. Frito-Lay Inc., 333 F. Supp. 977, 982 (C.D. Cal. 1971).

43. California v. Frito-Lay Inc., 474 F.2d 774, 777 (9th Cir. 1973).

44. *Id.*; Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972).

45. This bill was originally introduced as H.R. 12528 on February 4, 1974, by Congressman Rodino. It was subsequently reintroduced as H.R. 12921 with cosponsors from the Monopolies Subcommittee of the House Judiciary Committee. No action was taken on the bill in the Ninety-third Congress, and at the present time the bill is still in committee as H.R. 38 and H.R. 2850.

This bill was reintroduced in January and February of 1975 as H.R. 38 and H.R. 2850, respectively, and is presently being considered in the House Judiciary Committee. It adds three new subsections to section 4 of the Clayton Act. This note focuses on section 4C.[46]

Subsection (a) of new section 4C authorizes the attorneys general of the various states to bring antitrust treble damage and injunctive actions in each of the following circumstances:

1. As *parens patriae* of the citizen-consumers of the state for injuries individually sustained. This provision is in response to the Ninth Circuit's decision in *California v. Frito-Lay* which denied California standing to sue because there was no judicial or legislative precedent;

2. As a representative of a class of citizen-consumers who were individually injured. It is not clear whether this provision broadens the powers of the attorneys general to represent the state's citizens in a class action when the state itself is not a member of that class.

3. As *parens patriae* for injuries to the general economy of the state. This provision legitimates the type of action brought by the attorney general of Hawaii, but not allowed by the Supreme Court.[47]

Subsection (b) deals with the issues of recovery and distribution of funds when the state is suing on behalf of its injured citizens. During the floor debate, it was stated that paragraph (b)(1) "would streamline and expedite the proof of damages . . . . allowing total pur-

46. H.R. 2850, 94th Cong., 1st Sess. (1975), § 4C provides: "(a) Any attorney general of a State may bring a civil action in the name of such State in the district courts of the United States under section 4, or 16, or both, of this Act, and he shall be entitled to recover damages and secure other relief as provided in such sections—

(1) as parens patriae of the citizens of that State, with respect to damages personally sustained by such citizens, or, alternatively, if the court finds in its discretion that the interests of justice so require, as a representative member of the class consisting of the citizens of that State, who have been personally damaged; or

(2) as parens patriae, with respect to damages to the general economy of that State or any political subdivision thereof.

(b) In any action under paragraph (a)(1) of this section, the attorney general of a State—

(1) may recover the aggregate damages sustained by the citizens of that State, without separately proving the individual claims of each such citizen; and his proof of such damages may be based on statistical sampling methods, the pro rata allocation of excess profits to sales occurring within the State, or such other reasonable system of estimating aggregate damages as the court in its discretion may permit; and

(2) shall distribute, allocate, or otherwise pay out of the fund so recovered either (A) in accordance with State law, or, (B) in the absence of any applicable State law, as the district court may in its discretion authorize, subject to the requirement that any distribution procedure adopted afford each citizen of the State a reasonable opportunity to secure a pro rata portion of the fund attributable to his respective claims for damages, less litigation and administrative costs, before any of such fund is escheated or used for general welfare purposes."

47. Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

chases by all the consumers within a state and total overcharges for all such purchases to be proved together." Proof would be based on the use of "reasonable statistical sampling methods and other equitable and expeditious methods of proving the amount of damages that are attributable to proved violations of the law."[48] This system of recovery has been referred to in cases and commentaries as fluid class recovery[49] and has been used successfully in *settlements* of class action suits.[50] It is desirable because it bases recovery on the defendants' records so that the problems of stringent proof of damages are eliminated and the actual amount of illegal gains is recovered providing a significant deterrent to future violations. But in antitrust actions which have *gone to judgment* under the present laws, the recovery has been based only on the proven claims of the plaintiffs. Therefore, without fluid class recovery, the defendants are allowed to keep much of their illegal profits because many plaintiffs do not come forward with their claims, and others who do come forward are unable to produce sufficient evidence to prove their claims. The fluid class recovery alleviates the burdensome necessity of proving individual consumer damages at the time of trial and bases total damage recovery on the defendants' records.

Paragraph (b)(2) provides that the state should maintain a fund against which injured citizens may make individual claims for their share of the recovery. The remainder of the money in the fund would then be distributed according to either state law or judicial authorization. It is likely that these funds would be used by the state in a manner which would benefit the group of injured citizens. For example, if the case were brought for price fixing by the major oil companies, the funds remaining after individual recovery might be used to lower gasoline taxes or build highways. The importance of paragraph (b) is that all the defendants' illegal gains would be recovered, providing a benefit for the injured consumers and a deterrent to future violations of the antitrust laws by making it very costly for the violators to get caught.

One of the underlying principles of antitrust enforcement is the concept of the "private attorney general,"[51] the injured individual who may sue for treble damages under section 4 of the Clayton Act and

48. 120 Cong. Rec. 748 (daily ed. Feb. 20, 1974).

49. *See* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1012 (2d Cir. 1973), *aff'd*, 417 U.S. 156, (1974), holding that as a matter of statutory construction the fluid class recovery was not permitted under the federal class action rule, Fed. R. Civ. P. 23. *See also* Comment, *Due Process and Fluid Class Recovery*, 53 Ore. L. Rev. 225 (1974).

50. *See, e.g., In re* Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971).

51. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

thereby provide an additional deterrent to any potential violations of the antitrust laws. The proposed amendment to section 4 would expand this principle to make consumer treble damage actions a workable reality.

Why Not a Class Action?

Technically, a large group of injured consumers could bring a class action for treble damages under section 4 of the Clayton Act. This type of suit is regulated by Federal Rule of Civil Procedure 23, which sets out four prerequisites:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class and (4) the representative parties will fairly and adequately protect the interests of the class.[52]

In addition to these prerequisites under Rule 23(a), Rule 23(b) establishes three categories of actions under which the suit must fit. Rule 23(b)(3) is the only category which is applicable to a treble damage action; it requires that:

> the court [find] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[53]

The applicability of these rules to consumer antitrust actions has never been definitively settled. The Advisory Committee originally addressed itself to this issue in a less than straightforward manner. It said that "[p]rivate damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions."[54]

Assuming that a large-scale antitrust class action could satisfy Rule 23(a) and did involve "predominating common questions," it still must be shown that "a class action is superior to other available methods. . . ." One of the factors taken into consideration in determining this is whether the class will prove to be manageable. Manageability encompasses the whole range of practical problems that may render a class action format inappropriate for a particular suit. This includes notice to class members, proof of damages and distribution of damages.

52. Fed. R. Civ. P. 23(a).

53. Fed. R. Civ. P. 23(b)(3).

54. Proposed Rules of Civil Procedure, Advisory Committee Note to Rule 23, 39 F.R.D. 69, 103 (1966) [hereinafter cited as Proposed Rules].

There are very few large-scale consumer class actions which are able to pass the manageability test. As one commentator states: "These difficulties in managing class actions are not solved by rule 23, perhaps because the rulemakers did not fully anticipate the extent to which the new rule would be applied to such large class suits."[55]

Manageability of a large class is not the only problem Rule 23 fails to solve. Few small law firms on a contingent-fee basis, and even fewer consumers, have the resources to finance an extended suit which may take ten years and tens of thousands of dollars to bring to fruition. The tremendous expense of litigating an antitrust claim is a significant deterrent when a great number of individuals are each injured only slightly, as is usually the case in consumer actions. The existence of a class lends no aid at all to the representative party in his pursuit of the case. It is now common procedure for district courts to forbid any contact not pursuant to court order between the representative party and any actual or potential class member who is not a formal party to the proceeding.[56] Even if contact were permitted, most individual consumers cannot be identified during the preliminary stages, and few, if identified, would be willing to contribute funds. Though section 4 of the Clayton Act provides for treble damages, litigation costs and attorneys' fees if the suit is successful, the vast amount of time and money that is required to litigate an antitrust claim deters many potential plaintiffs.

Recognizing the obstacles confronting the consumer and the need for some alternative, the Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* made the following statement on the likelihood of a consumer class action in an antitrust case:

> These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.[57]

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55. Comment, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426, 427 (1973); *see, e.g.*, Hawaii v. Standard Oil Co., 405 U.S. 251, 256 (1972); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1017 (2d Cir. 1973).

56. *See* Section 1.41 and Appendix 1.41 in Manual for Complex Litigation (West 1973). The purpose of this procedure is to prevent the attorney for the class from soliciting class members to become named plaintiffs in order to increase the contingent fee.

57. 392 U.S. 481, 494 (1968). The Court rejected the defense that the plaintiff firm was not injured by defendant's antitrust violations because it "passed on" the additional cost to consumers.

There is one massive class action suit which did seem to overcome many, if not all of the objections to class actions posited above. *In re Antibiotic Antitrust Actions*,[58] was a joinder of 114 actions brought against five corporate defendants for price fixing in the marketing of broad spectrum antibiotics. Several of the actions were brought by states as representatives of a class of retail purchasers within the state. Since each state supports welfare programs which reimburse welfare recipients for the purchase of prescription drugs, including broad spectrum antibiotics, the state stands in the shoes of a substantial number of retail purchasers and thereby satisfies the requirement of Rule 23 that the representative of a class must be a member of that class.

The district court granted class action status contingent on a showing by the states that the action was manageable and that the classes could be adequately notified. The court foresaw the establishment of a fund of total damages—a fluid class recovery—which would increase the manageability of the classes by doing away with the necessity of rigorously proving every individual claim. The case was settled, so this issue was not ruled on by a higher court.

The notice required by Rule 23 was satisfied by "occupant" mailings to all addresses within the state which could be reasonably determined. This was sent by state government franked mail.

While this case seems to be an exception to the idea that the class action mechanism is inadequate for large-scale consumer actions, three factors distinguish this case from the norm and make it an exception which does not invalidate the rule. First, the suit was brought as a class action by the attorneys general. This is permitted only when a state has suffered the same type of injury as the members of the class. Since in a consumer action the class consists of retail purchasers, the state which does most of its purchasing at wholesale is rarely able to qualify. Without the facilities and resources of the various states, this action could not have proceeded past the notice stage. Second, the case was settled without having the decisions of the district court reviewed by a higher court. Third, this case was settled before the decision in *Eisen v. Carlisle & Jacquelin*,[59] commonly known as *Eisen III*, which held that a fluid class recovery was not permitted under Rule 23 and that a class action with millions of claimants, all of whom must present their individual claims to the defendants to recover, is unmanageable. Had the *Eisen* decision been handed down before the *Antibiotics* cases, the result of *Antibiotics* would probably have been different.

58. 333 F. Supp. 278 (S.D.N.Y. 1971).
59. 479 F.2d 1005 (2d Cir. 1973).

Because of the potential problems of manageability, the high costs of litigating and the low individual returns, the class action is not the optimal vehicle for effectuating the "private attorney general" concept authorized in section 4 of the Clayton Act. The alternative is the *parens patriae* suit under the proposed amendment to section 4.

Why Parens Patriae?

"Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. . . . This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation. In enacting these laws, Congress had many means at its disposal to penalize violators."[60]

Several methods of antitrust enforcement exist in addition to the individual or class actions discussed above. The Antitrust Division of the Department of Justice has the authority to bring criminal and injunctive proceedings for violations of the Sherman and Clayton Acts.[61] Successful criminal prosecution carries the potential of both fines and imprisonment for the officials of the company, and a $1,000,000 maximum fine for the company itself.[62] Although this may appear to be a significant deterrent, it must be realized that the profits gained from the type of violation that generally affects consumers far exceed the fines imposed.[63]

An injunction is equally ineffectual. Although it stops the practices complained of, its prospective nature diminishes its value as a deterrent. It would be quite rational for any profit-oriented company to continue to violate the antitrust laws until an injunction was issued.[64]

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60. Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).

61. Sherman Act, 15 U.S.C. §§ 1-4 (1970); Clayton Act, 15 U.S.C. §§ 12-27 (1970).

62. PUB. L. No. 93-528, § 3 (Dec. 21, 1974), *amending* 15 U.S.C. §§ 1-3 (1970). The maximum penalty for these officials is $100,000 and three years in prison.

63. Although the maximum fines have increased dramatically with legislation passed in 1975 (the previous maximums were $50,000 for a company and $5,000 for an individual), the courts rarely impose the maximum penalty. Since 1955 when the Sherman Act was amended to raise the maximum fine for corporations from $5,000 to $50,000, the average fine has increased by a factor of less than four. Imprisonment for corporate officers is rarely resorted to; prison sentences have been imposed in only 26 cases out of a total of 536 criminal convictions under the antitrust laws from 1890 to 1969. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & ECON. 365, 389-91 (1970) [hereinafter cited as Posner].

64. Injunctions, like consent decrees, merely prohibit a person or corporation from engaging in specific conduct which has been found to violate the antitrust laws. An injunction prohibits conduct which the entity has engaged in, while a consent decree prohibits conduct which the entity has allegedly engaged in without any admissions of past guilt. Both may effectively stop the specific prohibited practice, but both are

It is true that a successfully prosecuted civil or criminal action will be prima facie evidence in any subsequent civil suit, but a judgment issued either pursuant to a consent decree or before taking testimony will have no collateral effects.[65] Because of the limited legal resources of the Antitrust Division, the small percentage of violations that do get prosecuted are often settled by consent decree.[66] Therefore, the deterrent effect is almost entirely lacking.

In addition to giving authority to the Department of Justice, Congress created the Federal Trade Commission[67] to prevent unfair methods of competition.[68] The commission has the power to issue cease and desist orders when it finds a violation of the Federal Trade Commission Act or the Clayton Act. If the cease and desist order is disobeyed, the commission can impose a statutory penalty for each violation. This is essentially an injunction and carries no penalty unless there is a violation of a cease and desist order issued subsequent to a violation of either act. As was discussed above, while this may stop the specific conduct complained of, it does almost nothing to deter future violations of a different type.

Because of the lack of resources[69] and the limited range of penalties available, the federal government alone is not able to provide sufficient deterrents to prevent violations of the antitrust laws. Judge Real, in the district court opinion in *California v. Frito-Lay*,[70] observed:

> But what corporation would not risk violation of the antitrust laws where maximum penalties are miniscule compared to the potential harm to a public unable to meet "technical" requirements of proof of damage? Or, even more to the point—what corporation would risk violation of the antitrust laws if they were assured every penny of conspiratorial gain, three times over, were the ultimate result of a proven price-fixing conspiracy? Putting the question is its own obvious answer.[71]

Clearly the threat of a treble damage claim is the only penalty that will make a company scrupulously observe the antitrust laws.

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somewhat ineffectual as a deterrent to future violations of a different nature or to similar violations by a different company. This is because injunctions and consent decrees impose no penalties unless they are violated. Any gains which were achieved through the illegal acts prior to the prohibition are retained by the offending company.

65. 15 U.S.C. § 16(a) (1970).

66. Seventy-six percent of the judgments in favor of the government from 1890 to 1969 have been consent judgments. Posner, *supra* note 63, at 375.

67. 15 U.S.C. §§ 41-58 (1970).

68. 15 U.S.C. § 45(b) (1970).

69. Between 1965 and 1969 the Justice Department brought only 195 antitrust suits while the Federal Trade Commission brought only 76 (an average of 39 and 15 a year respectively). Posner, *supra* note 63, at 366-69.

70. 333 F. Supp. 977 (C.D. Cal. 1971), *rev'd*, 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973).

71. 333 F. Supp. at 981.

With the present restrictions on class actions and the impracticality of individual suits, the type of antitrust enforcement system proposed under Congressman Rodino's bill is necessary.

It is the primary responsibility of the state attorney general to protect the legal rights of the state and its citizens; it seems a natural extension of this responsibility to allow the state to represent its citizens' interests in court when they are unable to do so themselves.

Violations of the antitrust laws are often difficult to detect as the evidence is usually buried in voluminous documents. The attorney general has the investigative and legal capacity to discover the violations and prosecute the case. Furthermore, the attorney general would not have the problem of meeting the requirements of Rule 23 to which any class action suit is subject.

Judge Lord in the *Antibiotics* case indicated that the attorney general was an ideal representative of the state's consumers.

> [I]t is difficult to imagine a better representative of the retail consumers within a state than the state's attorney general. Historically the common law powers of the attorney general include the right and duty to take actions necessary to the maintenance of the general welfare and his presence in these actions is but a modern day application of that right and duty.[72]

Beyond the fact that the state is an appropriate agent for the enforcement of the treble damage claims of its citizens, there are compelling reasons why this enforcement should exist. The first of these is the deterrent value of the treble damage action.[73] While it is worthwhile for a company to violate the antitrust laws if its potential liabilities are less than its potential profits from the illegal activity, most companies will think carefully before violating the antitrust laws if there is the real probability that not only will all of the profits be confiscated, but double that amount will be taken as a penalty. Under the proposed amendment to section 4 of the Clayton Act, total actual damages, computed by statistical or sampling methods, will be trebled and then turned over to the attorney general for distribution. Faced with that unpleasant prospect, most companies will have a much greater incentive to remain inside the law.

Another reason for the prosecution of treble damage claims is to provide compensation to the injured parties. Though an injury may be small, this is nevertheless money to which the injured party is en-

72. *In re* Antibiotics Antitrust Actions, 333 F. Supp. 278, 280 (S.D.N.Y. 1971).

73. "Another purpose in permitting an injured party to recover threefold his actual damage was that substantial verdicts against the wrongdoer would constitute punitive sanctions—to act as a deterrent against a repetition of the offense and to serve as a warning to potential violators." United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 171 (S.D.N.Y. 1955).

titled and should be given access. The traditional methods, individual and class actions, have not been found to be effective for small claims, leaving the consumer no options for recovering his money. Though one recent case suggests that small claims are not sufficiently important to require adjudication,[74] this seems to overlook the right of an individual to his property[75] as well as the deterrent effect of the action on the offending company.

Although the proposed amendment seems to answer many of the pressing problems in enforcing the antitrust laws, it may create some problems of its own in effecting that enforcement.

A Potential Problem: Due Process in Parens Patriae Actions

Since a *parens patriae* suit is an entirely separate entity from a class action, it does not fall under the restrictions of Rule 23. This allows *parens patriae* suits to be brought in cases where class actions are not feasible. But there are certain safeguards to an individual's claim under Rule 23, the absence of which may render a *parens patriae* suit violative of due process.[76]

Because there is no notice requirement nor opportunity to participate in the litigation, a citizen may raise a constitutional objection and assert that the state has expropriated his personal claim. The question raised is whether citizens who have personally sustained damages are constitutionally entitled to notice of the commencement of the suit in order to exclude or include themselves in the action.

The Development of the Due Process Requirement of Notice

The constitutional requirement of due process is expressed in the Fifth and Fourteenth Amendments which provide, "No person shall . . . be deprived of life, liberty or property without due process of law."[77] *Mullane v. Central Hanover Bank & Trust Co.*[78] is generally cited as the principal authority for the proposition that individual notice to all known, interested parties is a requirement of due process.[79] But a

74. Hawaii v. Standard Oil Co., 405 U.S. 251, 263 (1972).

75. The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution require that an individual may not be deprived of property without "due process of law."

76. *See* Philadelphia Housing Auth. v. American Radiator, 309 F. Supp. 1057, 1062-63 (E.D. Pa. 1969).

77. U.S. CONST. amends. V, XIV.

78. 339 U.S. 306 (1950).

79. Proposed Rules, *supra* note 54, at 107.

close reading of *Mullane* reveals that this interpretation is not wholly accurate. The central issue in *Mullane* was the constitutional sufficiency of notice by publication to beneficiaries of a common trust fund for the judicial settlement of accounts by the trustee. The trust fund was organized under the New York Banking Law which required only publication in a local newspaper. The Court ruled that individual notice was required for "known present beneficiaries of known place of residence."[80] However, the Court did not rule that personal notice to all identifiable beneficiaries was an inflexible standard of due process to be applied in every case. It reached the result it did by balancing the protection of the individual afforded by the Fourteenth Amendment against the interests of the state in bringing any issue to a final settlement.[81] *Mullane*, then, stands for the proposition that a balancing test should be applied in each case to determine the extent of the due process notice requirements.

The factors which influenced the Court's decision were: 1) the trustee was in regular communication with the beneficiaries, so that the giving of notice was cheap and easy; 2) the interests of the various beneficiaries were adverse to one another, so that no one party could represent all of their interests adequately; 3) the trustee himself had interests adverse to the beneficiaries in that his main concern was to settle the account with a minimum of interference; 4) a relatively small number of beneficiaries were involved; and 5) the interests of many of the beneficiaries were substantial.[82] The Court held that there was sufficient individual interest to require personal notice; however, it declined to set up any parameters within which the balancing test would work:

> The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects.[83]

The principle implied in *Mullane* is that due process does not require efforts which go beyond the value of the right involved, when that right is a financial one.

Another case which has had a noted effect on the interpretation

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80. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950).

81. *Id.* at 314.

82. *Id.* at 309, 316-18; McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues*, 25 HASTINGS L.J. 1351, 1391 (1974).

83. 339 U.S. at 314.

of the due process requirement is *Hansberry v. Lee*,[84] which held that a judgment in an earlier class action was not res judicata against the defendant in the second action since his interests as plaintiff had not been adequately represented in the first suit. The plaintiff in *Hansberry* sought to enjoin the breach of a racially restrictive covenant by the black defendant who had acquired title to land in the restricted area. A stipulation by the plaintiff in a former class action that the covenant had been validated by a sufficient number of signatures was held not binding on the defendant in *Hansberry*. The decision notwithstanding, the Court noted that class actions were a long-standing exception to the rule that res judicata can be applied only to those who have adequate notice of the proceedings.[85] In class actions, and by analogy in *parens patriae* suits, the essential elements to satisfy the requirements of due process are a commonality of interests and a representative who adequately and fairly represents all of the members of the class.[86]

In reading *Mullane* and *Hansberry* together there seems to be no authorization for a rigid standard of individual notice, but rather a balancing of interests with adequacy of representation playing an important role in determining what type of notice, if any, is required.

Notice Under Rule 23

In 1966 the Advisory Committee completely revised Rule 23. One change was the addition of two notice requirements. Rule 23 (c)(2) provides, "In any class action maintained under subdivision (b)(3), the Court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The Advisory Committee described (c)(2) notice as mandatory "to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class."[87] Rule 23(d)(2) provides for discretionary notice at the option of the court. The Advisory Committee viewed these two subsections as fulfilling "requirements of due process to which the class action procedure is of course subject."[88] But as was noted above, the due process requirement of notice as interpreted by *Mullane* and *Hansberry* does not mandate the type of notice required by Rule 23(c)(2). *Mullane* called for a balancing of interests, not an abso-

84. 311 U.S. 32 (1940).

85. *Id.* at 41.

86. *Id.* at 42-43.

87. Proposed Rules, *supra* note 54, at 107. The purpose of excluding oneself from the class is to avoid the res judicata effect which would otherwise attach to a final judgment in an action prosecuted under 23(b)(3).

88. Proposed Rules *supra* note 54, at 107 (citing *Mullane* and *Hanover*).

lute requirement of individual notice; and *Hansberry* relied on adequacy of representation to insure procedural safeguards. Despite the actual holdings in these cases, many courts have been guided by the Advisory Committee's erroneous interpretation of what due process requires.

The most recent case to rule on this issue is *Eisen v. Carlisle & Jacquelin.*[89] The district court decided that the suit could be maintained as a class action on behalf of approximately six million odd-lot traders, and developed a plan by which the notice requirements of Rule 23(c)(2) could be satisfied by individual notice to a relatively small portion of the more than two million identifiable members of the class and published notice to the rest.[90] Judge Tyler made the following statement about his decision:

> [I]n determining what kind of notice is required by due process and Rule 23(c)(2), it must be recalled that expensive and stringent notice requirements could vitiate the class action device in situations where application thereof as a matter of public policy can be important, such as private antitrust, consumer and environmental litigation.[91]

In a decision referred to as *Eisen III*,[92] the Second Circuit reversed the holdings of the district court. Judge Medina, speaking for the court of appeals, determined that Rule 23(c)(2) "unambiguously" requires that individual notice must be given to all members of the class who can be readily identified, and that the cost of the notice must be borne by the plaintiff. He based his reasoning on Rule 23 language and its interpretation by the Advisory Committee, and on the "decided constitutional overtones" of the notice question.[93] It seems, however, that Judge Medina's view was unduly harsh in light of the interpretations of due process discussed earlier. Judge Oakes in his dissenting opinion cites *Hansberry* for the proposition that the due process requirements are met by a procedure that "fairly insures the protection of the interests of absent parties who are to be bound by [the judgment]."[94] Judge Oakes did not indicate whether he believed

89. 417 U.S. 156 (1974).

90. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 265-68 (S.D.N.Y. 1971). The court also provided for a "preliminary mini-hearing on the merits" which determined that defendants should pay for 90% of the notice costs, (54 F.R.D. 565 (S.D.N.Y. 1972)), and a fluid class recovery, without which, the court acknowledged, the class would be unmanageable. 52 F.R.D. 253, 264-65 (S.D.N.Y. 1971).

91. 52 F.R.D. at 266.

92. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973). This is the third decision by the Court of Appeals in this case.

93. *Id.* at 1015. The fluid class recovery concept was also rejected by the court as outside the language of Rule 23. *Id.* at 1018.

94. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1024 (2d Cir. 1973) (dissenting opinion of Oakes, J., from the denial of rehearing en banc), *quoting* Hansberry v. Lee, 311 U.S. 32, 42 (1940).

this "procedure" was present in *Eisen*, but only that the decision should be based on equitable grounds rather than on a strict interpretation of the requirements of Rule 23.

The Supreme Court affirmed the Second Circuit's decision, but did so strictly on the basis of the specific language of Rule 23. Justice Powell, delivering the opinion of the Court, said that Rule 23 required individual notice to all class members who could be identified with reasonable effort and that no portion of the costs of that notice could be imposed on the defendants.[95]

The courts and the Advisory Committee cite two purposes for their strict reading of the requirement of individual notice. The first is to allow any class member to exclude himself from the class and thereby avoid being bound by the decision.[96] The second is to give any class member an opportunity to enter an appearance in the action.[97] While both of these purposes are laudatory, they are not the only factors to be considered when deciding whether to allow an action to proceed. There may be equally compelling reasons for allowing an action to be brought when there is no other alternative and when the injured members are represented fairly and adequately, even though they may be denied the protections of voluntary exclusion and active participation.

Conclusion

It may be argued that a *parens patriae* suit for damages brought on behalf of a state's injured consumer-citizens violates the due process of those citizens by appropriating their cause of action. This argument seems to disregard the realities of the situation. Given the limitations of the antitrust laws and the inadequacies of Rule 23, if the suit were not brought by the state, it would, in all probability, not be brought at all.

There must be a balancing of interests to determine the extent to which the state must ensure the due process of its citizens. The state's interests include recovering damges for its consumer-citizens, depriving the violators of their illegal profits, and deterring future violations of the antitrust laws by showing that the state is willing to actively pursue any case within its realm. Against these must be balanced the individual's interests in avoiding the res judicata effect of a judgment in a case in which he was not an active participant in pursuing his own cause of action. These interests of the consumer are largely illusory as few consumers realize that an injury has occurred and even fewer

95. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).
96. Proposed Rules, *supra* note 54, at 107.
97. Fed. R. Civ. P. 23(c)(2)(C).

have a sufficient amount at stake to pursue an individual action. Though the consumer may be deprived of his cause of action, which is a form of property, if the suit is successful, he is not being deprived of his pro rata share of the recovery. The provisions of the bill allow the consumer to make his claim to the fund for his damages before any of the money escheats to the state. Indeed, to disallow the *parens patriae* suit would be a far greater denial of due process, because it would deprive the consumer of his one realistic opportunity to recover his property.[98]

The interest of the state in bringing a *parens patriae* action cannot be minimized. Aside from the potential recovery for the state and its citizens, the prophylactic effect of a treble damage suit is an important consideration. This would be the state's most potent weapon to protect its citizens from both present and contemplated violations of the antitrust laws. Without it a state would be left with the ineffectual alternatives of injunction under state and federal law and criminal penalty under state law.

98. Even Judge Medina in his harsh Eisen III opinion admitted that some alternative to a class action was needed in massive consumer suits: "And yet, even if amended Rule 23 furnishes no satisfactory solution in situations where immense numbers of consumers have been mulcted in various ways by illegal charges, it would seem that some means should be provided by law for the redress of these wrongs to the community and to society as a whole. The numerous decisions by courts in these class action cases have at least exposed the lack of adequate remedy under existing laws. From our extensive study of the whole situation in working on this *Eisen* case it would seem that amended Rule 23 provides an excellent and workable procedure in cases where the number of members of the class is not too large. It seems doubtful that further amendments to Rule 23 can be expected to be effective where there are millions of members of the class, without some infringement of constitutional requirements. The problem is really one for solution by the Congress. Numerous administrative agencies protect consumers in various ways. It should, we think, be possible for the Congress to create some public body to do justice in the matter of consumers' claims in such fashion as to afford compensation to the injured consumer. If penalties are to be imposed upon wrongdoers, at least let the Congress decide how the money is to be spent." Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1019 (2d Cir. 1973).

WARTH ET AL. *v.* SELDIN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 73-2024. Argued March 17, 1975—Decided June 25, 1975

This action for declaratory and injunctive relief and damages was brought by certain of the petitioners against respondent town of Penfield (a suburb of Rochester, N. Y.), and respondent members of Penfield's Zoning, Planning, and Town Boards, claiming that the town's zoning ordinance, by its terms and as enforced, effectively excluded persons of low and moderate income from living in the town, in violation of petitioners' constitutional rights and of 42 U. S. C. §§ 1981, 1982, and 1983. Petitioners consist of both the original plaintiffs—(1) Metro-Act of Rochester, a not-for-profit corporation among whose purposes is fostering action to alleviate the housing shortage for low- and moderate-income persons in the Rochester area; (2) several individual Rochester taxpayers; and (3) several Rochester area residents with low or moderate incomes who are also members of minority racial or ethnic groups—and Rochester Home Builders Association (Home Builders), embracing a number of residential construction firms in the Rochester area, which unsuccessfully sought to intervene as a party-plaintiff, and the Housing Council in the Monroe County Area (Housing Council), a not-for-profit corporation consisting of a number of organizations interested in housing problems, which was unsuccessfully sought to be added as a party-plaintiff. The District Court dismissed the complaint on the ground, *inter alia,* that petitioners lacked standing to prosecute the action, and the Court of Appeals affirmed. *Held:* Whether the rules of standing are considered as aspects of the constitutional requirement that a plaintiff must make out a "case or controversy" within the meaning of Art. III, or, apart from such requirement, as prudential limitations on the courts' role in resolving disputes involving "generalized grievances" or third parties' legal rights or interests, none of the petitioners has met the threshold requirement of such rules that to have standing a complainant must clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers. Pp. 498–518.

(a) As to petitioner Rochester residents who assert standing as persons of low or moderate income and, coincidentally, as members of minority racial or ethnic groups, the facts alleged fail to support an actionable causal relationship between Penfield's zoning practices and these petitioners' alleged injury. A plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that such practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention. Here, these petitioners rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief. Pp. 502–508.

(b) With respect to petitioners who assert standing on the basis of their status as Rochester taxpayers, claiming that they are suffering economic injury through increased taxes resulting from Penfield's zoning practices having forced Rochester to provide more tax-abated low- or moderate-cost housing than it otherwise would have done, the line of causation between Penfield's actions and such injury is not apparent. But even assuming that these petitioners could establish that the zoning practices harm them, the basis of their claim is that the practices violate the constitutional and statutory rights of third parties—persons of low and moderate income who allegedly are excluded from Penfield. Hence, their claim falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves. Pp. 508–510.

(c) Petitioner Metro-Act's claims to standing as a Rochester taxpayer and on behalf of its members who are Rochester taxpayers or persons of low or moderate income, are precluded for the reasons applying to the denial of standing to the individual petitioner Rochester taxpayers and persons of low and moderate income. In addition, with respect to Metro-Act's claim to standing because 9% of its membership is composed of Penfield residents, prudential considerations strongly counsel against according such residents or Metro-Act standing, where the complaint is that they have been harmed indirectly by the exclusion of others, thus attempting, in the absence of a showing of any exception allowing such a claim, to raise the putative rights of third parties. *Trafficante* v. *Metropolitan Life Ins.*, 409 U. S 205, distinguished. Pp. 512–514.

(d) Petitioner Home Builders, which alleges no monetary injury to itself, has no standing to claim damages on behalf of its members, since whatever injury may have been suffered is peculiar to the individual member concerned, thus requiring individualized proof of both the fact and extent of injury and individual awards. Nor does Home Builders have standing to claim prospective relief, absent any allegation of facts sufficient to show the existence of any injury to members of sufficient immediacy and ripeness to warrant judicial intervention. Pp. 514–516.

(e) Petitioner Housing Council has no standing, where the complaint and record do not indicate that any of its members, with one exception, has made any effort involving Penfield, has taken any steps toward building there, or had any dealings with respondents. With respect to the one exception, this petitioner averred no basis for inferring that an earlier controversy between it and respondents remained a live, concrete dispute. Pp. 516–517.

495 F. 2d 1187, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 518. BRENNAN, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, *post*, p. 519.

Emmelyn Logan-Baldwin argued the cause for petitioners. With her on the briefs were *Sanford Liebschutz* and *Michael Nelson*.

James M. Hartman argued the cause for respondents. With him on the brief were *Douglas S. Gates*, *J. William Ernstrom*, and *Luther C. Nadler*.*

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*Briefs of *amici curiae* urging reversal were filed by *Jack Greenberg*, *James M. Nabrit III*, *Charles Stephen Ralston*, and *Norman J. Chachkin* for the N. A. A. C. P. Legal Defense and Educational Fund, Inc.; by *Martin E. Sloane* and *Arthur D. Wolf* for the National Committee Against Discrimination in Housing; and by *J. Harold Flannery*, *Paul R. Dimond*, and *William E. Caldwell* for the Lawyers' Committee for Civil Rights Under Law.

David H. Moskowitz filed a brief for Regional Housing Legal Services, Inc., as *amicus curiae*.

MR. JUSTICE POWELL delivered the opinion of the Court.

Petitioners, various organizations and individuals resident in the Rochester, N. Y., metropolitan area, brought this action in the District Court for the Western District of New York against the town of Penfield, an incorporated municipality adjacent to Rochester, and against members of Penfield's Zoning, Planning, and Town Boards. Petitioners claimed that the town's zoning ordinance, by its terms and as enforced by the defendant board members, respondents here, effectively excluded persons of low and moderate income from living in the town, in contravention of petitioners' First, Ninth, and Fourteenth Amendment rights and in violation of 42 U. S. C. §§ 1981, 1982, and 1983. The District Court dismissed the complaint and denied a motion by petitioner Rochester Home Builders Association, Inc., for leave to intervene as party-plaintiff. The Court of Appeals for the Second Circuit affirmed, holding that none of the plaintiffs, nor Home Builders Association, had standing to prosecute the action. 495 F. 2d 1187 (1974). We granted the petition for certiorari. 419 U. S. 823 (1974). For reasons that differ in certain respects from those upon which the Court of Appeals relied, we affirm.

I

Petitioners Metro-Act of Rochester, Inc., and eight individual plaintiffs, on behalf of themselves and all persons similarly situated,[1] filed this action on January 24,

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[1] Plaintiffs claimed to represent, pursuant to Fed. Rule Civ. Proc. 23 (b)(2), classes constituting "all taxpayers of the City of Rochester, all low and moderate income persons residing in the City of Rochester, all black and/or Puerto Rican/Spanish citizens residing in the City of Rochester and all persons employed but excluded from living in the Town of Penfield who are affected or may in the fu-

1972, averring jurisdiction in the District Court under 28 U. S. C. §§ 1331 and 1343. The complaint identified Metro-Act as a not-for-profit New York corporation, the purposes of which are "to alert ordinary citizens to problems of social concern; . . . to inquire into the reasons for the critical housing shortage for low and moderate income persons in the Rochester area and to urge action on the part of citizens to alleviate the general housing shortage for low and moderate income persons." [2] Plaintiffs Vinkey, Reichert, Warth, and Harris were described as residents of the city of Rochester, all of whom owned real property in and paid property taxes to that city.[3] Plaintiff Ortiz, "a citizen of Spanish/Puerto Rican extraction," App. 7, also owned real property in and paid taxes to Rochester. Ortiz, however, resided in Wayland, N. Y., some 42 miles from Penfield where he was employed.[4] The complaint described plaintiffs Broadnax, Reyes, and Sinkler as residents of Rochester and "persons fitting within the classification of low and moderate income as hereinafter defined. . . ." [5] *Ibid.* Al-

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ture be affected by the defendants' policies and practices. . . ." App. 9.

[2] *Id.*, at 8–9.

[3] Plaintiff Harris was further described in the complaint as "a negro person who is denied certain rights by virtue of her race. . . ." App. 5. We find no indication in the record that Harris had either the desire or intent to live in Penfield were suitable housing to become available. Indeed, petitioners now appear to claim standing for Harris only on the ground that she is a taxpayer of Rochester. See Brief for Petitioners 9, 12.

[4] According to Ortiz' affidavit, submitted in answer to respondents' motion to dismiss, he was employed in Penfield from 1966 to May 1972. App. 366–367.

[5] In fact, however, the complaint nowhere defines the term "low and moderate income" beyond the parenthetical phrase "without the capital requirements to purchase real estate." *E. g., id.*, at 18. In addition to the inadequacy of this definition, the record discloses

though the complaint does not expressly so state, the record shows that Broadnax, Reyes, and Sinkler are members of ethnic or racial minority groups: Reyes is of Puerto Rican ancestry; Broadnax and Sinkler are Negroes.

Petitioners' complaint alleged that Penfield's zoning ordinance, adopted in 1962, has the purpose and effect of excluding persons of low and moderate income from residing in the town. In particular, the ordinance allocates 98% of the town's vacant land to single-family detached housing, and allegedly by imposing unreasonable requirements relating to lot size, setback, floor area, and habitable space, the ordinance increases the cost of single-family detached housing beyond the means of persons of low and moderate income. Moreover, according to petitioners, only 0.3% of the land available for residential construction is allocated to multifamily structures (apartments, townhouses, and the like), and even on this limited space, housing for low- and moderate-income persons is not economically feasible because of low density and other requirements. Petitioners also alleged that "in furtherance of a policy of exclusionary zoning," *id.*, at 22, the defendant members of Penfield's Town, Zoning, and Planning Boards had acted in an arbitrary and discriminatory manner: they had delayed action on proposals for low- and moderate-cost housing for inordinate periods of time; denied such proposals for arbitrary and insubstantial reasons; refused to grant necessary variances and permits, or to allow tax abatements; failed to provide necessary support services for low- and moderate-cost housing projects; and had

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wide variations in the income, housing needs, and money available for housing among the various "low and moderate income" plaintiffs. See Part III, *infra*.

amended the ordinance to make approval of such projects virtually impossible.

In sum, petitioners alleged that, in violation of their "rights, privileges and immunities secured by the Constitution and laws of the United States," *id.*, at 17, the town and its officials had made "practically and economically impossible the construction of sufficient numbers of low and moderate income . . . housing in the Town of Penfield to satisfy the minimum housing requirements of both the Town of Penfield and the metropolitan Rochester area . . . ."[6] Petitioners alleged, moreover, that by precluding low- and moderate-cost housing, the town's zoning practices also had the effect of excluding persons of minority racial and ethnic groups, since most such persons have only low or moderate incomes.

Petitioners further alleged certain harm to themselves. The Rochester property owners and taxpayers—Vinkey, Reichert, Warth, Harris, and Ortiz—claimed that because of Penfield's exclusionary practices, the city of Rochester had been forced to impose higher tax rates on them and others similarly situated than would otherwise have been necessary. The low- and moderate-income, minority plaintiffs—Ortiz, Broadnax, Reyes, and Sinkler—claimed that Penfield's zoning practices had prevented them from acquiring, by lease or purchase, residential property in the town, and thus had forced them and their families to reside in less attractive environments. To relieve these various harms, petitioners asked the District Court to declare the Penfield ordinance unconstitutional, to enjoin the defendants from enforcing the ordinance, to order the defendants to enact and administer a new ordinance designed to alleviate the effects of their past actions, and to award $750,000 in actual and exemplary damages.

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[6] App. 25–26.

On May 2, 1972, petitioner Rochester Home Builders Association, an association of firms engaged in residential construction in the Rochester metropolitan area, moved the District Court for leave to intervene as a party-plaintiff. In essence, Home Builders' intervenor complaint repeated the allegations of exclusionary zoning practices made by the original plaintiffs. It claimed that these practices arbitrarily and capriciously had prevented its member firms from building low- and moderate-cost housing in Penfield, and thereby had deprived them of potential profits. Home Builders prayed for equitable relief identical in substance to that requested by the original plaintiffs, and also for $750,000 in damages.[7] On June 7, 1972, Metro-Act and the other original plaintiffs moved to join petitioner Housing Council in the Monroe County Area, Inc., as a party plaintiff. Housing Council is a not-for-profit New York corporation, its membership comprising some 71 public and private organizations interested in housing problems. An affidavit accompanying the motion stated that 17 of Housing Council's member groups were or hoped to be involved in the development of low- and moderate-cost housing, and that one of its members—the Penfield Better Homes Corp.—"is and has been actively attempting to develop moderate income housing" in Penfield, "but has been stymied by its inability to secure the necessary approvals . . . ."[8]

Upon consideration of the complaints and of extensive supportive materials submitted by petitioners, the District Court held that the original plaintiffs, Home Builders, and Housing Council lacked standing to prosecute

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[7] Home Builders also asked the District Court to enjoin the defendants from carrying out threatened retaliation against its members if Home Builders joined this litigation.

[8] *Id.*, at 174.

the action, that the original complaint failed to state a claim upon which relief could be granted, that the suit should not proceed as a class action, and that, in the exercise of discretion, Home Builders should not be permitted to intervene. The court accordingly denied the motion to add Housing Council as a party-plaintiff, denied Home Builders' motion to intervene, and dismissed the complaint. The Court of Appeals affirmed, reaching only the standing questions.

II

We address first the principles of standing relevant to the claims asserted by the several categories of petitioners in this case. In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. *E. g., Barrows* v. *Jackson,* 346 U. S. 249, 255–256 (1953). In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society. See *Schlesinger* v. *Reservists to Stop the War,* 418 U. S. 208, 221–227 (1974); *United States* v. *Richardson,* 418 U. S. 166, 188–197 (1974) (POWELL, J., concurring).

In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on

his behalf. *Baker* v. *Carr*, 369 U. S. 186, 204 (1962).[9] The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action . . . ." *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973). See *Data Processing Service* v. *Camp*, 397 U. S. 150, 151–154 (1970).[10]

Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. First, the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. *E. g., Schlesinger* v. *Reservists to Stop the War, supra; United States* v. *Richardson, supra; Ex parte Lévitt*, 302 U. S. 633, 634 (1937). Second, even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *E. g., Tileston* v. *Ullman*, 318 U. S. 44 (1943). See *United States* v. *Raines*, 362 U. S. 17 (1960); *Barrows* v.

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[9] See H. Hart & H. Wechsler, The Federal Courts and the Federal System 156 (2d ed. 1973).

[10] The standing question thus bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention—and of mootness—whether the occasion for judicial intervention persists. *E. g., Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498 (1972); *Hall* v. *Beals*, 396 U. S. 45 (1969). See *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 154–156 (1951) (Frankfurter, J., concurring).

Jackson, supra. Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights. See, *e. g., Schlesinger* v. *Reservists to Stop the War*, 418 U. S., at 222.[11]

Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, *e. g., Flast* v. *Cohen*, 392 U. S. 83, 99 (1968), it often turns on the nature and source of the claim asserted. The actual or threatened injury required by Art. III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing . . . ." See *Linda R. S.* v. *Richard D.*, 410 U. S., at 617 n. 3; *Sierra Club* v. *Morton*, 405 U. S. 727, 732 (1972). Moreover, the source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes. Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.[12] In some circumstances, counter-

[11] Cf. Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645 (1973).

[12] A similar standing issue arises when the litigant asserts the rights of third parties defensively, as a bar to judgment against him. *E. g. Barrows* v. *Jackson*, 346 U. S. 249 (1953); *McGowan* v. *Maryland*, 366 U. S. 420, 429–430 (1961). In such circumstances, there is no Art. III standing problem; but the prudential question is governed by considerations closely related to the question whether a person in the litigant's position would have a right of action on the claim. See Part IV, *infra*.

vailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties. See *United States* v. *Raines,* 362 U. S., at 22–23. In such instances, the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the plaintiff. See *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S. 229, 237 (1969). See generally Part IV, *infra.* Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. *E. g., United States* v. *SCRAP,* 412 U. S. 669 (1973). But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim. *E. g., Sierra Club* v. *Morton, supra,* at 737; *FCC* v. *Sanders Radio Station,* 309 U. S. 470, 477 (1940).

One further preliminary matter requires discussion. For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. *E. g., Jenkins* v. *McKeithen,* 395 U. S. 411, 421–422 (1969). At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this oppor-

tunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.

III

With these general considerations in mind, we turn first to the claims of petitioners Ortiz, Reyes, Sinkler, and Broadnax, each of whom asserts standing as a person of low or moderate income and, coincidentally, as a member of a minority racial or ethnic group. We must assume, taking the allegations of the complaint as true, that Penfield's zoning ordinance and the pattern of enforcement by respondent officials have had the purpose and effect of excluding persons of low and moderate income, many of whom are members of racial or ethnic minority groups. We also assume, for purposes here, that such intentional exclusionary practices, if proved in a proper case, would be adjudged violative of the constitutional and statutory rights of the persons excluded.

But the fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that the respondents' assertedly illegal actions have violated their rights. Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, "none may seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974). See, *e. g.*, *Bailey* v. *Patterson*, 369 U. S. 31, 32–33 (1962).

In their complaint, petitioners Ortiz, Reyes, Sinkler, and Broadnax alleged in conclusory terms that they are among the persons excluded by respondents' actions.[13] None of them has ever resided in Penfield; each claims at least implicitly that he desires, or has desired, to do so. Each asserts, moreover, that he made some effort, at some time, to locate housing in Penfield that was at once within his means and adequate for his family's needs. Each claims that his efforts proved fruitless.[14]

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[13] Petitioner Ortiz also alleged that as a result of such exclusion he had to incur substantial commuting expenses between his residence and his former place of employment in Penfield; and, in supporting affidavits, each petitioner recites at some length the disadvantages of his or her present housing situation and how that situation might be improved were residence in Penfield possible. For purposes of standing, however, it is the exclusion itself that is of critical importance, since exclusion alone would violate the asserted rights quite apart from any objective or subjective disadvantage that may flow from it.

[14] In his affidavit submitted in opposition to respondents' motion to dismiss, petitioner Ortiz stated:

"Since my job at that time and continuing until May of 1972 was in the Town of Penfield, I initiated inquiries about renting and/or buying a home in the Town of Penfield. However, because of my income being low or moderate, I found that there were no apartment units large enough to house my family of wife and seven children, nor were there apartment units that were available reasonably priced so that I could even afford to rent the largest apartment unit. I have been reading ads in the Rochester metropolitan newspapers since coming to Rochester in 1966 and during that time and to the present time, I have not located either rental housing or housing to buy in Penfield." App. 37.

Petitioner Reyes averred that, for some time before locating and purchasing their present residence in Rochester, she and her husband had searched for a suitable residence in suburban communities: "[O]ur investigation for housing included the Rochester bedroom communities of Webster, Irondequoit, Penfield and Perinton. Our search over a period of two years led us to no possible purchase in any of these towns." *Id.*, at 428. Petitioner Sinkler stated

We may assume, as petitioners allege, that respondents' actions have contributed, perhaps substantially, to the cost of housing in Penfield. But there remains the question whether petitioners' inability to locate suitable housing in Penfield reasonably can be said to have resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions. Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed. *Linda R. S.* v. *Richard D.*, 410 U. S. 614 (1973).

We find the record devoid of the necessary allegations. As the Court of Appeals noted, none of these petitioners has a present interest in any Penfield property; none is himself subject to the ordinance's strictures; and none has ever been denied a variance or permit by respondent officials. 495 F. 2d, at 1191. Instead, petitioners claim that respondents' enforcement of the ordinance against third parties—developers, builders, and the like—has had the consequence of precluding the construction of housing suitable to their needs at prices they might be able to afford. The fact that the harm to petitioners may have resulted indirectly does not in itself preclude stand-

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that she had "searched for alternate housing in the Rochester metropolitan area," including the town of Penfield, and had found that "a black person has no choice of housing . . . ." In particular, "there are no apartments available in the Town of Penfield which a person of my income level can afford." *Id.*, at 452–453. Petitioner Broadnax said only that she had "bought newspapers and read ads and walked to look for apartments until I found the place where I now reside. I found that there was virtually no choice of housing in the Rochester area." *Id.*, at 407.

ing. When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights. *E. g., Roe* v. *Wade,* 410 U. S. 113, 124 (1973). But it may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.

Here, by their own admission, realization of petitioners' desire to live in Penfield always has depended on the efforts and willingness of third parties to build low- and moderate-cost housing. The record specifically refers to only two such efforts: that of Penfield Better Homes Corp., in late 1969, to obtain the rezoning of certain land in Penfield to allow the construction of subsidized cooperative townhouses that could be purchased by persons of moderate income; and a similar effort by O'Brien Homes, Inc., in late 1971.[15] But

[15] Penfield Better Homes contemplated a series of one- to three-bedroom units and hoped to sell them—at that time—to persons who earned from $5,000 to $8,000 per year. The Penfield Planning Board denied the necessary variance on September 9, 1969, because of incompatibility with the surrounding neighborhood, projected traffic congestion, and problems of severe soil erosion during construction. *Id.*, at 629–633, 849–859, 883–884. O'Brien Homes, Inc., projected 51 buildings, each containing four family units, designed for single people and small families, and capable of being purchased by persons "of low income and accumulated funds" and "of moderate income with limited funds for down payment . . . ." *Id.*, at 634. The variance for this project was denied by the Planning Board on October 12, 1971; a revision of the proposal was reconsidered by the Planning Board in April 1972, and, from all indications of record, apparently remains under consideration. The record also indicates the existence of several proposals for "planned unit developments"; but we are not told whether these projects

the record is devoid of any indication that these projects, or other like projects, would have satisfied petitioners' needs at prices they could afford, or that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners. Indeed, petitioners' descriptions of their individual financial situations and housing needs suggest precisely the contrary—that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts.[16] In

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would allow sale at prices that persons of low or moderate income are likely to be able to afford. There is, more importantly, not the slightest suggestion that they would be adequate, and of sufficiently low cost, to meet these petitioners' needs.

[16] Ortiz states in his affidavit that he is now purchasing and resides in a six-bedroom dwelling in Wayland, N. Y.; and that he owns and receives rental income from a house in Rochester. He is concerned with finding a house or apartment large enough for himself, his wife, and seven children, but states that he can afford to spend a maximum of $120 per month for housing. *Id.*, at 370. Broadnax seeks a four-bedroom house or apartment for herself and six children, and can spend a maximum of about $120 per month for housing. *Id.*, at 417–418. Sinkler also states that she can spend $120 per month for housing for herself and two children. *Id.*, at 452–453. Thus, at least in the cases of Ortiz and Broadnax, it is doubtful that their stated needs could have been satisfied by the small housing units contemplated in the only moderate-cost projects specifically described in the record. Moreover, there is no indication that any of the petitioners had the resources necessary to acquire the housing available in the projects. The matter is left entirely obscure. The income and housing budget figures supplied in petitioners' affidavits are presumably for the year 1972. The vague description of the proposed O'Brien development strongly suggests that the units, even if adequate for their needs, would have been beyond the means at least of Sinkler and Broadnax. See n. 15, *supra*. The Penfield Better Homes projected price figures were for 1969, and must be assumed—even if subsidies might still be available—to have increased substantially by 1972, when the complaint was filed. Petitioner Reyes presents a special case: she states that her family

short, the facts alleged fail to support an actionable causal relationship between Penfield's zoning practices and petitioners' asserted injury.

In support of their position, petitioners refer to several decisions in the District Courts and Courts of Appeals, acknowledging standing in low-income, minority-group plaintiffs to challenge exclusionary zoning practices.[17] In those cases, however, the plaintiffs challenged zoning restrictions as applied to particular projects that would supply housing within their means, and of which they were intended residents. The plaintiffs thus were able to demonstrate that unless relief from assertedly illegal actions was forthcoming, their immediate and personal interests would be harmed. Petitioners here assert no like circumstances. Instead, they rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief.

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has an income of over $14,000 per year, that she can afford $231 per month for housing, and that, in the past and apparently now, she wants to purchase a residence. As noted above, see n. 5, *supra*, the term "low and moderate income" is nowhere defined in the complaint; but Penfield Better Homes defined the term as between $5,000 and $8,000 per year. See n. 15, *supra*. Since that project was to be subsidized, presumably petitioner Reyes would have been ineligible. There is no indication that in nonsubsidized projects, removal of the challenged zoning restrictions—in 1972—would have reduced the price on new single-family residences to a level that petitioner Reyes thought she could afford.

[17] See, *e. g.*, *Park View Heights Corp.* v. *City of Black Jack*, 467 F. 2d 1208 (CA8 1972); *Crow* v. *Brown*, 457 F. 2d 788 (CA5 1972), aff'g 332 F. Supp. 382 (ND Ga. 1971); *Kennedy Park Homes Assn.* v. *City of Lackawanna*, 436 F. 2d 108 (CA2 1970), cert. denied, 401 U. S. 1010 (1971); *Dailey* v. *City of Lawton*, 425 F. 2d 1037 (CA10 1970). Cf. *United Farmworkers of Florida Housing Project, Inc.* v. *City of Delray Beach*, 493 F. 2d 799 (CA5 1974).

We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the courts' intervention.[18] Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of "a real need to exercise the power of judicial review" or that relief can be framed "no broader than required by the precise facts to which the court's ruling would be applied." *Schlesinger* v. *Reservists to Stop the War*, 418 U. S., at 221–222.

IV

The petitioners who assert standing on the basis of their status as taxpayers of the city of Rochester present a different set of problems. These "taxpayer-petitioners" claim that they are suffering economic injury consequent to Penfield's allegedly discriminatory and exclusionary zoning practices. Their argument, in brief, is that Penfield's persistent refusal to allow or to facilitate construction of low- and moderate-cost housing forces the city of Rochester to provide more such housing than it otherwise would do; that to provide such housing, Rochester must allow certain tax abatements; and

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[18] This is not to say that the plaintiff who challenges a zoning ordinance or zoning practices must have a present contractual interest in a particular project. A particularized personal interest may be shown in various ways, which we need not undertake to identify in the abstract. But usually the initial focus should be on a particular project. See, *e. g.*, cases cited in n. 17, *supra*. We also note that zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities. They are, of course, subject to judicial review in a proper case. But citizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process.

that as the amount of tax-abated property increases, Rochester taxpayers are forced to assume an increased tax burden in order to finance essential public services.

"Of course, pleadings must be something more than an ingenious academic exercise in the conceivable." *United States* v. *SCRAP,* 412 U. S., at 688. We think the complaint of the taxpayer-petitioners is little more than such an exercise. Apart from the conjectural nature of the asserted injury, the line of causation between Penfield's actions and such injury is not apparent from the complaint. Whatever may occur in Penfield, the injury complained of—increases in taxation—results only from decisions made by the appropriate Rochester authorities, who are not parties to this case.

But even if we assume that the taxpayer-petitioners could establish that Penfield's zoning practices harm them,[19] their complaint nonetheless was properly dismissed. Petitioners do not, even if they could, assert any personal right under the Constitution or any statute to be free of action by a neighboring municipality that may have some incidental adverse effect on Rochester. On the contrary, the only basis of the taxpayer-petitioners' claim is that Penfield's zoning ordinance and practices violate the constitutional and statutory rights of third parties, namely, persons of low and moderate income who are said to be excluded from Penfield. In short the claim of these petitioners falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves. As we have observed above, this rule of judicial self-governance is subject to exceptions, the most prominent of which is that Congress may remove it by statute. Here, how-

[19] Cf. *United States* v. *SCRAP,* 412 U. S. 669, 688–690 (1973). But see *Roe* v. *Wade,* 410 U. S. 113, 127–129 (1973).

ever, no statute expressly or by clear implication grants a right of action, and thus standing to seek relief, to persons in petitioners' position. In several cases, this Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights. See, *e. g., Doe* v. *Bolton*, 410 U. S. 179, 188 (1973); *Griswold* v. *Connecticut*, 381 U. S. 479, 481 (1965); *Barrows* v. *Jackson*, 346 U. S. 249 (1953). But the taxpayer-petitioners are not themselves subject to Penfield's zoning practices. Nor do they allege that the challenged zoning ordinance and practices preclude or otherwise adversely affect a relationship existing between them and the persons whose rights assertedly are violated. *E. g., Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S., at 237; *NAACP* v. *Alabama*, 357 U. S. 449, 458–460 (1958); *Pierce* v. *Society of Sisters*, 268 U. S., at 534–536. No relationship, other than an incidental congruity of interest, is alleged to exist between the Rochester taxpayers and persons who have been precluded from living in Penfield. Nor do the taxpayer-petitioners show that their prosecution of the suit is necessary to insure protection of the rights asserted, as there is no indication that persons who in fact have been excluded from Penfield are disabled from asserting their own right in a proper case.[20] In sum, we discern no justification for recognizing in the Rochester taxpayers a right of action on the asserted claim.

V

We turn next to the standing problems presented by the petitioner associations—Metro-Act of Rochester,

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[20] See generally Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599 (1962). Cf. *Bigelow* v. *Virginia*, 421 U. S. 809, 815–817 (1975).

Inc., one of the original plaintiffs; Housing Council in the Monroe County Area, Inc., which the original plaintiffs sought to join as a party-plaintiff; and Rochester Home Builders Association, Inc., which moved in the District Court for leave to intervene as plaintiff. There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. Moreover, in attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties. *E. g., NAACP* v. *Alabama, supra,* at 458–460; *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 183–187 (1951) (Jackson, J., concurring). With the limited exception of Metro-Act, however, none of the associational petitioners here has asserted injury to itself.

Even in the absence of injury to itself, an association may have standing solely as the representative of its members. *E. g., National Motor Freight Assn.* v. *United States,* 372 U. S. 246 (1963). The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy. See *Sierra Club* v. *Morton,* 405 U. S. 727 (1972). The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. *Id.,* at 734–741. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

A

Petitioner Metro-Act's claims to standing on its own behalf as a Rochester taxpayer, and on behalf of its members who are Rochester taxpayers or persons of low or moderate income, are precluded by our holdings in Parts III and IV, *supra,* as to the individual petitioners, and require no further discussion. Metro-Act also alleges, however, that 9% of its membership is composed of present residents of Penfield. It claims that, as a result of the persistent pattern of exclusionary zoning practiced by respondents and the consequent exclusion of persons of low and moderate income, those of its members who are Penfield residents are deprived of the benefits of living in a racially and ethnically integrated community. Referring to our decision in *Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U. S. 205 (1972), Metro-Act argues that such deprivation is a sufficiently palpable injury to satisfy the Art. III case-or-controversy requirement, and that it has standing as the representative of its members to seek redress.

We agree with the Court of Appeals that *Trafficante* is not controlling here. In that case, two residents of an apartment complex alleged that the owner had discriminated against rental applicants on the basis of race, in violation of § 804 of the Civil Rights Act of 1968, 82 Stat. 83, 42 U. S. C. § 3604. They claimed that, as a result of such discrimination, "they had been injured in that (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto.'" 409 U. S., at 208. In light of the clear congressional purpose

in enacting the 1968 Act, and the broad definition of "person aggrieved" in § 810 (a), 42 U. S. C. § 3610 (a), we held that petitioners, as "person[s] who claim[ed] to have been injured by a discriminatory housing practice," had standing to litigate violations of the Act. We concluded that Congress had given residents of housing facilities covered by the statute an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others. 409 U. S., at 212.

Metro-Act does not assert on behalf of its members any right of action under the 1968 Civil Rights Act, nor can the complaint fairly be read to make out any such claim.[21] In this, we think, lies the critical distinction between *Trafficante* and the situation here. As we have

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[21] The *amicus* brief of the Lawyers' Committee for Civil Rights under Law argues, to the contrary, that petitioners' allegations do state colorable claims under the 1968 Act, and that Metro-Act's Penfield members are "person[s] aggrieved" within the meaning of § 810 (a). It is significant, we think, that petitioners nowhere adopt this argument. As we read the complaint, petitioners have not alleged that respondents "refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of race, color, . . . or national origin,*" or that they "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, *because of race, color, . . . or national origin.*" 42 U. S. C. §§ 3604 (a) and (b) (emphasis added). Instead, the gravamen of the complaint is that the challenged zoning practices have the purpose and effect of excluding persons of low and moderate income from residing in the town, and that this in turn has the consequence of excluding members of racial or ethnic minority groups. This reading of the complaint is confirmed by petitioners' brief in this Court. Brief for Petitioners 41. We intimate no view as to whether, had the complaint alleged purposeful racial or ethnic discrimination, Metro-Act would have stated a claim under § 804. See *Park View Heights Corp.* v. *City of Black Jack*, 467 F. 2d 1208 (CA8 1972).

observed above, Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute. *Linda R. S.* v. *Richard D.*, 410 U. S., at 617 n. 3, citing *Trafficante* v. *Metropolitan Life Ins., Co., supra,* at 212 (WHITE, J., concurring). No such statute is applicable here.

Even if we assume, *arguendo,* that apart from any statutorily created right the asserted harm to Metro-Act's Penfield members is sufficiently direct and personal to satisfy the case-or-controversy requirement of Art. III, prudential considerations strongly counsel against according them or Metro-Act standing to prosecute this action. We do not understand Metro-Act to argue that Penfield residents themselves have been denied any constitutional rights, affording them a cause of action under 42 U. S. C. § 1983. Instead, their complaint is that they have been harmed indirectly by the exclusion of others. This is an attempt to raise putative rights of third parties, and none of the exceptions that allow such claims is present here.[22] In these circumstances, we conclude that it is inappropriate to allow Metro-Act to invoke the judicial process.

B

Petitioner Home Builders, in its intervenor-complaint, asserted standing to represent its member firms engaged in the development and construction of residential housing in the Rochester area, including Penfield. Home Builders alleged that the Penfield zoning restrictions,

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[22] Metro-Act does not allege that a contractual or other relationship protected under §§ 1981 and 1982 existed between its Penfield members and any particular person excluded from residing in the town, nor that any such relationship was either punished or disrupted by respondents. See *Sullivan* v. *Little Hunting Park,* 396 U. S. 229, 237 (1969).

together with refusals by the town officials to grant variances and permits for the construction of low- and moderate-cost housing, had deprived some of its members of "substantial business opportunities and profits." App. 156. Home Builders claimed damages of $750,000 and also joined in the original plaintiffs' prayer for declaratory and injunctive relief.

As noted above, to justify any relief the association must show that it has suffered harm, or that one or more of its members are injured. *E. g., Sierra Club* v. *Morton,* 405 U. S. 727 (1972). But, apart from this, whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind. *E.g., National Motor Freight Assn.,* 372 U. S. 246 (1963). See *Data Processing Service* v. *Camp,* 397 U. S. 150 (1970). Cf. Fed. Rule Civ. Proc. 23 (b)(2).

The present case, however, differs significantly as here an association seeks relief in damages for alleged injuries to its members. Home Builders alleges no monetary injury to itself, nor any assignment of the damages claims of its members. No award therefore can be made to the association as such. Moreover, in the circumstances of this case, the damages claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individual-

ized proof. Thus, to obtain relief in damages, each member of Home Builders who claims injury as a result of respondents' practices must be a party to the suit, and Home Builders has no standing to claim damages on his behalf.

Home Builders' prayer for prospective relief fails for a different reason. It can have standing as the representative of its members only if it has alleged facts sufficient to make out a case or controversy had the members themselves brought suit. No such allegations were made. The complaint refers to no specific project of any of its members that is currently precluded either by the ordinance or by respondents' action in enforcing it. There is no averment that any member has applied to respondents for a building permit or a variance with respect to any current project. Indeed, there is no indication that respondents have delayed or thwarted any project currently proposed by Home Builders' members, or that any of its members has taken advantage of the remedial processes available under the ordinance. In short, insofar as the complaint seeks prospective relief, Home Builders has failed to show the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention. See, *e. g.*, *United Public Workers* v. *Mitchell*, 330 U. S. 75, 86–91 (1947); *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941).

A like problem is presented with respect to petitioner Housing Council. The affidavit accompanying the motion to join it as plaintiff states that the Council includes in its membership "at least seventeen" groups that have been, are, or will be involved in the development of low- and moderate-cost housing. But, with one exception, the complaint does not suggest that any of these groups has focused its efforts on Penfield or has any specific

plan to do so. Again with the same exception, neither the complaint nor any materials of record indicate that any member of Housing Council has taken any step toward building housing in Penfield, or has had dealings of any nature with respondents. The exception is the Penfield Better Homes Corp. As we have observed above, it applied to respondents in late 1969 for a zoning variance to allow construction of a housing project designed for persons of moderate income. The affidavit in support of the motion to join Housing Council refers specifically to this effort, and the supporting materials detail at some length the circumstances surrounding the rejection of Better Homes' application. It is therefore possible that in 1969, or within a reasonable time thereafter, Better Homes itself and possibly Housing Council as its representative would have had standing to seek review of respondents' action. The complaint, however, does not allege that the Penfield Better Homes project remained viable in 1972 when this complaint was filed, or that respondents' actions continued to block a then-current construction project.[23] In short, neither the complaint nor the record supplies any basis from which to infer that the controversy between respondents and Better Homes, however vigorous it may once have been, remained a live, concrete dispute when this complaint was filed.

VI

The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of pru-

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[23] If it had been averred that the zoning ordinance or respondents were unlawfully blocking a pending construction project, there would be a further question as to whether Penfield Better Homes had employed available administrative remedies, and whether it should be required to do so before a federal court can intervene.

dential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers. We agree with the District Court and the Court of Appeals that none of the petitioners here has met this threshold requirement. Accordingly, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

With all respect, I think that the Court reads the complaint and the record with antagonistic eyes. There are in the background of this case continuing strong tides of opinion touching on very sensitive matters, some of which involve race, some class distinctions based on wealth.

A clean, safe, and well-heated home is not enough for some people. Some want to live where the neighbors are congenial and have social and political outlooks similar to their own. This problem of sharing areas of the community is akin to that when one wants to control the kind of person who shares his own abode. Metro-Act of Rochester, Inc., and the Housing Council in the Monroe County Area, Inc.—two of the associations which bring this suit—do in my opinion represent the communal feeling of the actual residents and have standing.

The associations here are in a position not unlike that confronted by the Court in *NAACP* v. *Alabama,* 357 U. S. 449 (1958). Their protest against the creation of this segregated community expresses the desire of their members to live in a desegregated community—a desire which gives standing to sue under the Civil Rights Act

of 1968 as we held in *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205 (1972). Those who voice these views here seek to rely on other Civil Rights Acts and on the Constitution, but they too should have standing, by virtue of the dignity of their claim, to have the case decided on the merits.

Standing has become a barrier to access to the federal courts, just as "the political question" was in earlier decades. The mounting caseload of federal courts is well known. But cases such as this one reflect festering sores in our society; and the American dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed. I would lower the technical barriers and let the courts serve that ancient need. They can in time be curbed by legislative or constitutional restraints if an emergency arises.

We are today far from facing an emergency. For in all frankness, no Justice of this Court need work more than four days a week to carry his burden. I have found it a comfortable burden carried even in my months of hospitalization.

As MR. JUSTICE BRENNAN makes clear in his dissent, the alleged purpose of the ordinance under attack was to preclude low- and moderate-income people and nonwhites from living in Penfield. The zoning power is claimed to have been used here to foist an un-American community model on the people of this area. I would let the case go to trial and have all the facts brought out. Indeed, it would be better practice to decide the question of standing only when the merits have been developed.

I would reverse the Court of Appeals.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

In this case, a wide range of plaintiffs, alleging various kinds of injuries, claimed to have been affected by the

Penfield zoning ordinance, on its face and as applied, and by other practices of the defendant officials of Penfield. Alleging that as a result of these laws and practices low- and moderate-income and minority people have been excluded from Penfield, and that this exclusion is unconstitutional, plaintiffs sought injunctive, declaratory, and monetary relief. The Court today, in an opinion that purports to be a "standing" opinion but that actually, I believe, has overtones of outmoded notions of pleading and of justiciability, refuses to find that any of the variously situated plaintiffs can clear numerous hurdles, some constructed here for the first time, necessary to establish "standing." While the Court gives lip service to the principle, oft repeated in recent years,[1] that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal," *ante*, at 500, in fact the opinion, which tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional, can be explained only by an indefensible hostility to the claim on the merits. I can appreciate the Court's reluctance to adjudicate the complex and difficult legal questions involved in determining the constitutionality of practices which assertedly limit residence in a particular municipality to those who are white and relatively well off, and I also understand that the merits of this case could involve grave sociological and political ramifications. But courts cannot refuse to hear a case on the merits merely because they would prefer not to, and it is quite clear, when the record is viewed with dispassion, that at least three of the groups of plaintiffs have made

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[1] *Flast* v. *Cohen*, 392 U. S. 83, 99 (1968); *Data Processing Service* v. *Camp*, 397 U. S. 150, 153, 158 (1970); *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 225 n. 15 (1974). See *Barlow* v. *Collins*, 397 U. S. 159, 176 (1970) (opinion of BRENNAN, J.).

allegations, and supported them with affidavits and documentary evidence, sufficient to survive a motion to dismiss for lack of standing.[2]

I

Before considering the three groups I believe clearly to have standing—the low-income, minority plaintiffs, Rochester Home Builders Association, Inc., and the Housing Council in the Monroe County Area, Inc.—it will be helpful to review the picture painted by the allegations as a whole, in order better to comprehend the interwoven interests of the various plaintiffs. Indeed, one glaring defect of the Court's opinion is that it views each set of plaintiffs as if it were prosecuting a separate lawsuit, refusing to recognize that the interests are intertwined, and that the standing of any one group must take into account its position vis-à-vis the others. For example, the Court says that the low-income minority plaintiffs have not alleged facts sufficient to show that but for the exclusionary practices claimed, they would be able to reside in Penfield. The Court then intimates that such a causal relationship could be shown only if "the initial focus [is] on a particular project." *Ante,* at 508 n. 18. Later, the Court objects to the ability of the Housing Council to prosecute the suit on behalf of its member, Penfield Better Homes Corp., *despite* the fact that Better Homes *had* displayed an interest in a particular project, because that project was no longer live. Thus, we must suppose that even if the low-income plaintiffs had alleged a desire to live in the Better Homes project, that allegation would

[2] Because at least three groups of plaintiffs have, in my view, alleged standing sufficient to require this lawsuit to proceed to discovery and trial, I do not deal in this dissent with the standing of the remaining petitioners.

be insufficient because it appears that particular project might never be built. The rights of low-income minority plaintiffs who desire to live in a locality, then, seem to turn on the willingness of a third party to litigate the legality of preclusion of a particular project, despite the fact that the third party may have no economic incentive to incur the costs of litigation with regard to one project, and despite the fact that the low-income-minority plaintiffs' interest is *not* to live in a particular project but to live somewhere in the town in a dwelling they can afford.

Accepting, as we must, the various allegations and affidavits as true, the following picture emerges: The Penfield zoning ordinance, by virtue of regulations concerning "lot area, set backs, . . . population density, density of use, units per acre, floor area, sewer requirements, traffic flow, ingress and egress[, and] street location," makes "practically and economically impossible the construction of sufficient numbers of low and moderate income" housing. App. 25. The *purpose* of this ordinance was to preclude low- and moderate-income people and nonwhites from living in Penfield, *id.*, at 15, and, particularly because of refusals to grant zoning variances and building permits and by using special permit procedures and other devices, *id.*, at 17, the defendants succeeded in keeping "low and moderate income persons . . . and non-white persons . . . from residing within . . . Penfield." *Id.*, at 18.

As a result of these practices, various of the plaintiffs were affected in different ways. For example, plaintiffs Ortiz, Reyes, Sinkler, and Broadnax, persons of low or moderate income and members of minority groups, alleged that *"as a result"* of respondents' exclusionary scheme, *id.*, at 18, 21, 23–24, 26, 29 (emphasis supplied), they could not live in Penfield, although they

desired and attempted to do so, and consequently incurred greater commuting costs, lived in substandard housing, and had fewer services for their families and poorer schools for their children than if they had lived in Penfield. Members of the Rochester Home Builders Association were prevented from constructing homes for low- and moderate-income people in Penfield, *id.*, at 153, harming them economically. And Penfield Better Homes, a member of the Housing Council, was frustrated in its attempt to build moderate-income housing, *id.*, at 174.

Thus, the portrait which emerges from the allegations and affidavits is one of total, purposeful, intransigent exclusion of certain classes of people from the town, pursuant to a conscious scheme never deviated from. Because of this scheme, those interested in building homes for the excluded groups were faced with insurmountable difficulties, and those of the excluded groups seeking homes in the locality quickly learned that their attempts were futile. Yet, the Court turns the very success of the allegedly unconstitutional scheme into a barrier to a lawsuit seeking its invalidation. In effect, the Court tells the low-income minority and building company plaintiffs they will not be permitted to prove what they have alleged—that they could and would build and live in the town if changes were made in the zoning ordinance and its application—because they have not succeeded in breaching, before the suit was filed, the very barriers which are the subject of the suit.

II

Low-income and Minority Plaintiffs

As recounted above, plaintiffs Ortiz, Broadnax, Reyes, and Sinkler alleged that "as a result" of respondents' exclusionary practices, they were unable, despite at-

tempts, to find the housing they desired in Penfield, and consequently have incurred high commuting expenses, received poorer municipal services,[3] and, in some instances, have been relegated to live in substandard housing.[4] The Court does not, as it could not, suggest that

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[3] Specifically, petitioner Ortiz claims, among other things, that the Penfield schools offer a much broader curriculum, including vocational education, than the school his children attend, as well as special tutoring and counseling programs not available to his children. Penfield also provides a comprehensive recreational program, while his community offers very little, and a full-time, comprehensive public library, while his community has only limited library services. App. 377–400.

Petitioner Broadnax claimed that if she lived in Penfield, there would be playgrounds for her children, effective police protection, and adequate garbage disposal, all of which are lacking in her present community. *Id.*, at 419. As a result, her children are not safe and there are mice, rats, and roaches in her house. *Id.*, at 416–417, 419.

Petitioner Reyes stated, similarly, that she is currently living with inadequate police protection, *id.*, at 426, and sending her children to inferior schools, *id.*, at 433.

Finally, petitioner Sinkler also said that in her current home, police protection is inadequate, *id.*, at 443, there are no play areas for children, *id.*, at 449, and the schools are totally inadequate. *Id.*, at 454.

These are only summaries of the affidavits, which are quite specific in detailing the inadequacies of petitioners' current communities and the injuries suffered thereby as well as, in Ortiz' affidavit, the services provided by Penfield which would alleviate many of these problems.

[4] Petitioner Broadnax said that because of the poor choice of housing available at her income, she was forced to rent an apartment which has "many leaks in the roof, bad wiring, roach infestation, rat and mice infestation, crumbling house foundation, broken front door, broken hot water heater, etc." *Id.*, at 410. As a result, aside from the ordinary dangers such conditions obviously present, one son's asthma condition has been exacerbated. *Id.*, at 413.

Petitioner Sinkler stated that, again because only housing in

the injuries, if proved, would be insufficient to give petitioners the requisite "personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues," *Baker* v. *Carr*, 369 U. S. 186, 204 (1962); *Flast* v. *Cohen*, 392 U. S. 83, 99 (1968). Rather, it is abundantly clear that the harm *alleged* satisfies the "injury in fact, economic or otherwise," *Data Processing Service* v. *Camp*, 397 U. S. 150, 152 (1970), requirement which is prerequisite to standing in federal court. The harms claimed—consisting of out-of-pocket losses as well as denial of specifically enumerated services available in Penfield but not in these petitioners' present communities, see nn. 3 and 4, *supra*—are obviously *more* palpable and concrete than those held sufficient to sustain standing in other cases. See *United States* v. *SCRAP*, 412 U. S. 669, 686 (1973); *Sierra Club* v. *Morton*, 405 U. S. 727, 735 n. 8, 738, and n. 13 (1972). Cf. *Data Processing*, *supra*, at 154.

Instead, the Court insists that these petitioners' allegations are insufficient to show that the harms suffered were *caused* by petitioners' allegedly unconstitutional practices, because "their inability to reside in Penfield [may be] the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts." *Ante*, at 506.

True, this Court has held that to maintain standing, a plaintiff must not only allege an injury but must also assert a " 'direct' relationship between the alleged injury

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Rochester central city is available to moderate-income, minority people, she is living in a seventh-floor apartment with exposed radiator pipes, no elevator, and no screens, and violence, theft, and sexual attacks are frequent. *Id.*, at 441–446.

Once again, the above are short summaries of long, detailed accounts of the harms suffered.

and the claim sought to be adjudicated," *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 618 (1973)—that is, "[t]he party who invokes [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury *as the result* of [a statute's] enforcement." *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923) (emphasis supplied); *Linda R. S.*, *supra*, at 618. But as the allegations recited above show, these petitioners have alleged precisely what our cases require—that *because* of the exclusionary practices of petitioners, they cannot live in Penfield and have suffered harm.[5]

Thus, the Court's real holding is not that these petitioners have not *alleged* an injury resulting from respondents' action, but that they are not to be allowed to prove one, because "realization of petitioners' desire to live in Penfield always has depended on the efforts and willingness of third parties to build low- and moderate-cost housing," *ante*, at 505, and "the record is devoid of any indication that . . . [any] projects would have satisfied petitioners' needs at prices they could afford." *Ante*, at 506.

Certainly, this is not the sort of demonstration that can or should be required of petitioners at this preliminary stage. In *SCRAP*, *supra*, a similar challenge was made: it was claimed that the allegations were vague, 412 U. S., at 689 n. 15, and that the causation theory

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[5] This case is quite different from *Linda R. S.* v. *Richard D.*, 410 U. S. 614 (1973). In *Linda R. S.*, the problem was that even if everything alleged were proved, it was still quite possible that petitioner's husband would not be prosecuted for nonsupport, or that, if prosecuted, he will still not contribute to his children's support. Nothing which could be proved at trial could possibly show otherwise. Here, if these petitioners prove what they have alleged, they will have shown that respondents' actions did cause their injury.

asserted was untrue, *id.*, at 689. We said: "If . . . these allegations were in fact untrue, then the appellants should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact. We cannot say . . . that the appellees could not prove their allegations which, if proved, would place them squarely among those persons injured in fact." *Id.*, at 689–690.[6] See also *Jenkins* v. *McKeithen*, 395 U. S. 411, 421–422 (1969).

Here, the very fact that, as the Court stresses, these petitioners' claim rests in part upon proving the intentions and capabilities of third parties to build in Penfield suitable housing which they can afford, coupled with the exclusionary character of the claim on the merits, makes it particularly inappropriate to assume that these petitioners' lack of specificity reflects a fatal weakness in their theory of causation.[7] Obviously they cannot be ex-

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[6] There is some suggestion made in the briefs that, by virtue of the inclusion in the record of affidavits and documents, the motion to dismiss was, under Fed. Rule Civ. Proc. 12 (b), converted into a Rule 56 motion for summary judgment. In terms, the portion of Rule 12 (b) concerning conversion to a Rule 56 motion applies only to a motion to dismiss for failure to state a cause of action, and not to a motion to dismiss for other reasons. At any rate, respondents filed no counter-affidavits proper under Rule 56 (e), so that even if Rule 56 were applied, respondents have not at this stage disproved the allegations.

[7] The Court, glancing at the projects mentioned in the record which might have been built but for the exclusionary practices alleged, concludes that petitioners Ortiz and Broadnax earned too little to afford suitable housing in them, and that petitioner Reyes earned too much. *Ante*, at 506–507, n. 16. As the Court implicitly acknowledges, petitioner Sinkler at least may well have been able to live in the Better Homes Project. Further, there appears in the record as it stands a report of the Penfield Housing Task Force on Moderate Income Housing, App. 487–581, prepared for the Pen-

pected, prior to discovery and trial, to know the future plans of building companies, the precise details of the housing market in Penfield, or everything which has transpired in 15 years of application of the Penfield zoning ordinance, including every housing plan suggested and refused. To require them to allege such facts is to require them to prove their case on paper in order to get into court at all, reverting to the form of fact pleading long abjured in the federal courts. This Court has not required such unachievable specificity in standing cases in the past, see *SCRAP, supra,* and *Jenkins, supra,* and the fact that it does so now can only be explained by an indefensible determination by the Court to close the doors of the federal courts to claims of this kind. Understandably, today's decision will be read as revealing hostility to breaking down even unconstitutional zoning

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field Town Board itself, which defines "*moderate income families* as families having incomes between $5,500 and $11,000 per year, depending on the size of the family," *id.*, at 492, and moderate-income housing as housing "priced below $20,000 or [carrying] a rental price of less than $150 a month," *id.*, at 493. See also, with respect to "low income," *id.*, at 527. Thus, while the Court might not know what was meant by "low" and "moderate" income housing, *ante*, at 494–495, n. 5, and 506–507, n. 16, respondents clearly did. The petitioners here under discussion fell within the Board's own definition of moderate-income families, except for petitioner Reyes, who alleges that she could afford a house for $20,000 but not more. App. 428. And the Task Force Report *does* set out, *id.*, at 503–516, changes in the zoning ordinance and its application which could result in housing which moderate-income people could afford, even to the extent of setting out a budget provided by a builder for a house costing $18,900, *id.*, at 507. The causation theory which the Court finds improbable, then, was adopted by a task force of the Town Board itself. Of course, we do not know at this stage whether the particular named plaintiffs would *certainly* have benefited from the changes recommended by the task force, but at least there is a good chance that, after discovery and trial, they could show they would.

barriers that frustrate the deep human yearning of low-income and minority groups for decent housing they can afford in decent surroundings, see nn. 3 and 4, *supra*.

III

Associations Including Building Concerns

Two of the petitioners are organizations among whose members are building concerns. Both of these organizations, Home Builders and Housing Council, alleged that these concerns have attempted to build in Penfield low- and moderate-income housing, but have been stymied by the zoning ordinance and refusal to grant individual relief therefrom.

Specifically, Home Builders, a trade association of concerns engaged in constructing and maintaining residential housing in the Rochester area, alleged that "[d]uring the past 15 years, over 80% of the private housing units constructed in the Town of Penfield have been constructed by [its] members." App. 147. Because of respondents' refusal to grant relief from Penfield's restrictive housing statutes, members of Home Builders could not proceed with planned low- and moderate-income housing projects, *id.*, at 157, and thereby lost profits. *Id.*, at 156.

Housing Council numbers among its members at least 17 groups involved in the development and construction of low- and middle-income housing. In particular, one member, Penfield Better Homes, "*is* and has been actively attempting to develop moderate income housing in . . . Penfield" (emphasis supplied), *id.*, at 174, but has been unable to secure the necessary approvals. *Ibid.*

The Court finds that these two organizations lack standing to seek prospective relief for basically the same reasons: none of their members is, as far as the allegations show, *currently* involved in developing a *particular*

project. Thus, Home Builders has "failed to show the existence of any injury to its members *of sufficient immediacy and ripeness* to warrant judicial intervention," *ante,* at 516 (emphasis supplied), while "the controversy between respondents and Better Homes, however vigorous it may once have been, [has not] remained a live, concrete dispute." *Ante,* at 517.

Again, the Court ignores the thrust of the complaints and asks petitioners to allege the impossible. According to the allegations, the building concerns' experience in the past with Penfield officials has shown any plans for low- and moderate-income housing to be futile for, again according to the allegations, the respondents are engaged in a purposeful, conscious scheme to exclude such housing. Particularly with regard to a low- or moderate-income project, the cost of litigating, with respect to any particular project, the legality of a refusal to approve it may well be prohibitive. And the merits of the exclusion of this or that project is not at the heart of the complaint; the claim is that respondents will not approve *any* project which will provide residences for low- and moderate-income people.

When this sort of pattern-and-practice claim is at the heart of the controversy, allegations of past injury, which members of both of these organizations have clearly made, and of a future intent, if the barriers are cleared, again to develop suitable housing for Penfield, should be more than sufficient. The past experiences, if proved at trial, will give credibility and substance to the claim of interest in future building activity in Penfield. These parties, if their allegations are proved, certainly have the requisite personal stake in the outcome of *this* controversy, and the Court's conclusion otherwise is only a conclusion that *this* controversy may not be litigated in a federal court.

I would reverse the judgment of the Court of Appeals.

Morton EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated, Plaintiff-Appellee,

v.

CARLISLE & JACQUELIN and DeCoppet & Doremus, Each Limited Partnerships under New York Partnership Law, Article 8 and New York Stock Exchange, an Unincorporated Association, Defendants-Appellees.

Nos. 341, 381, Dockets 72-1521, 30934.

United States Court of Appeals, Second Circuit.

Argued Dec. 12, 1972.

Decided May 1, 1973.

Rehearing and Rehearing En Banc Denied in No. 72-1521 May 24, 1973.

Treble damage antitrust action was brought by odd-lot investor against two brokerage firms and the New York Stock Exchange on behalf of himself and all other odd-lot investors during a four-year period. The United States District Court for the Southern District of New York, Harold R. Tyler, Jr., J., 41 F.R.D. 147, entered order determining that action was not maintainable as a class action and the investor appealed. The Court of Appeals, 391 F.2d 555, reversed, retained jurisdiction and remanded case for evidentiary hearing. On remand, the United States District Court for the Southern District of New York rendered opinions in 52 F.R.D. 253, and 54 F.R.D. 565, holding action maintainable as a class action and requiring defendants to bear 90% of cost of notice. On appeal the Court of Appeals, Medina, Circuit Judge, held that odd-lot investor's treble damage claim which he sought to maintain on behalf of himself and all other odd-lot investors dealing with New York Stock Exchange, a class of approximately 6,000,000 persons of whom about 2,000,000 were easily identifiable, was not maintainable as a class action under rules regardless of the fluid class recovery theory, and action was not manageable.

Reversed and case dismissed.

Hays, Circuit Judge, filed an opinion concurring in the result.

Kaufman, Circuit Judge, with whom Friendly, Feinberg, Mansfield and Mulligan, Circuit Judges, joined, filed an opinion concurring in the denial of rehearing en banc. Mansfield, Circuit Judge, filed an opinion concurring in the denial of a rehearing en banc. Hayes, Circuit Judge, dissented from the denial of a rehearing en banc.

Oakes, Circuit Judge, with whom Timbers, Circuit Judge, concurs, filed an opinion dissenting from the denial of a rehearing en banc.

1. Federal Civil Procedure ⇐161

Plaintiff odd-lot investor bringing action on behalf of himself and all other buyers and sellers of odd lots on New York Stock Exchange against brokerage firm charging conspiracy to monopolize odd-lot trading in violation of Sherman Act would be required, if entitled to maintain action as a class action, to give actual notice to those whose identities could be ascertained with reasonable effort and to pay the expense of giving notice to these members of the class. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

2. Courts ⇐406.8

Where Court of Appeals retained jurisdiction and specifically remanded odd-lot traders treble damage action against brokerage firms on behalf of himself and all other odd-lot investors for consideration of problem of manageability of class action and plaintiff conceded that action was not manageable if fluid class recovery was not permissible, on appeal from order of district court holding that action was maintainable as a class action the fluid class recovery theory was ripe for review by Court of Appeals. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

3. Federal Civil Procedure ⇐181

Odd-lot investor's treble damage claim against brokerage firms which he

sought to maintain on behalf of himself and all other odd-lot investors in New York Stock Exchange during a four-year period, a class of approximately 6,000,000 persons of whom about 2,000,000 were easily identifiable, was not maintainable as a class action under rules regardless of the fluid class recovery theory, and action was not manageable. Fed.Rules Civ.Proc. rules 23, 23(c)(2), 28 U.S.C.A.; Clayton Act, § 4, 15 U.S.C.A. § 15; Securities Exchange Act of 1934, § 6, 15 U.S.C.A. § 78f.

4. Securities Regulation ⟹82

Securities and Exchange Commission does possess supervisory powers over the amount and uniformity of commissions to be paid on odd-lot purchases and sales of stocks. Securities Exchange Act of 1934, §§ 11(b), 19(b), 15 U.S.C.A. §§ 78k(b), 78s(b).

5. Federal Civil Procedure ⟹161

Amended rule on class action is not intended to affect substantive rights of parties to any litigation. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.; 28 U.S.C.A. § 2072.

6. Courts ⟹406.6(12)
Federal Civil Procedure ⟹161

In view of class action rule requiring notice to class to be the best notice practicable and including individual notice to all members who can be identified with reasonable effort, ruling of district court in treble damage action by odd-lot investor on behalf of himself and all other odd-lot investors, a class numbering approximately 6,000,000 of which about 2,000,000 could be readily identified, that actual notice be sent only to approximately 2,000 or more class members and to 5,000 others selected at ramdom was reversibly erroneous. Fed. Rules Civ.Proc. rule 23(c)(2) 28 U.S.C.A.; Clayton Act, § 4, 15 U.S.C.A. § 15.

7. Federal Civil Procedure ⟹161

There is no rule-making provision for any tentative, provisional or other makeshift determination of issue of any case on merits for the avowed purpose of deciding collateral matter such as which party is to be required to pay for the mailing, publishing or otherwise giving any notice required by law. Fed. Rules Civ.Proc. rule 23, 28 U.S.C.A.

8. Federal Civil Procedure ⟹161

Holding of a preliminary or mini-hearing in civil damage antitrust action by odd-lot investor against brokerage firms and the New York Stock Exchange on behalf of himself and all other odd-lot investors, a class numbering approximately 6,000,000 of which about 2,500,000 were reasonably identifiable, to determine who should bear cost of mailing of notice was improper. Fed. Rules Civ.Proc. rule 23, 28 U.S.C.A.; Clayton Act, § 4, 15 U.S.C.A. § 15.

9. Federal Civil Procedure ⟹161

Where there are millions of members of class, speaking different languages and dispersed throughout the world, notices by publication giving essential information required by class action rule are a farce. Fed.Rules Civ. Proc. rule 23, 28 U.S.C.A.

10. Federal Civil Procedure ⟹161

Amended class action rule does not contemplate or provide for a fluid recovery procedure. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

Aaron M. Fine, Philadelphia, Pa. (Harold E. Kohn and Allen D. Black, Philadelphia, Pa., and Mordecai Rosenfeld, New York City, on the brief), for plaintiff-appellee.

Devereux Milburn, New York City (Louis L. Stanton, Jr., James E. Massey, and Carter, Ledyard & Milburn, New York City, on the brief), for defendant-appellee Carlisle & Jacquelin.

Francis S. Bensel, New York City (Bud G. Holman and Kelley Drye Warren Clark Carr & Ellis, New York City, on the brief), for defendant-appellee DeCoppet & Doremus.

William E. Jackson, New York City (Russell E. Brooks and Milbank, Tweed, Hadley & McCloy, New York City, on

the brief), for defendant-appellee New York Stock Exchange, Inc.

Before MEDINA, LUMBARD and HAYS, Circuit Judges.

MEDINA, Circuit Judge:

Sufficient factual background for an understanding of the rulings we are about to make in this extraordinary "class action" is to be found in our first opinion Eisen v. Carlisle & Jacquelin, 2 Cir., 391 F.2d 555 (1968), often referred to as *Eisen II*. On that appeal we remanded the case to the District Court for reconsideration and for findings on specific issues and we retained jurisdiction.[1] While entertaining grave doubts on the questions of notice and manageability, we thought the original rejection of the case as a class action had been too summary, that improper standards had been applied and inadequate consideration given to the specific requirements of amended Rule 23.

After almost five years the case is before us again. While much of the delay

1. We retained jurisdiction because of the doubt engendered by the phraseology of the "death knell" opinion, Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035, 87 S.Ct. 1487, 18 L.Ed.2d 598 (1967) (*Eisen I*). We thought this case might be construed as making appealable an interlocutory order dismissing a case as a class action because "no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen," see Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977, 89 S.Ct. 2131, 23 L.Ed.2d 766 (1969), but perhaps denying appealability to a similar order holding the case to be a proper class action under amended Rule 23. While the "death knell" doctrine has been criticized by the Third Circuit in Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925, 92 S.Ct. 2460, 32 L.Ed.2d 812 (1972), we think the consequences of class action rulings are so serious that these interlocutory orders should be made appealable, provided we adopt the view expressed by Chief Judge Friendly in Korn v. Franchard Corp., *supra*, 443 F.2d at 1307, to the effect that this Court should formulate the rule of appealability in such fashion that it "will afford equality of treatment as between plaintiffs and defendants." The same considerations which led this Circuit to apply the rule of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) in *Eisen I*, also would seem to require a rule allowing a defendant to appeal from an interlocutory order permitting the representative plaintiff to continue the suit as a class action.

The "collateral order" doctrine of *Cohen* is based on the pragmatic view that a decision which finally determines an issue in the case which is crucial to the further conduct of the case, and is collateral to the merits of the action, is to receive immediate appellate review if delay in such review will cause "irreparable harm" to the complaining party. The seeds of *Cohen* were sowed by the Supreme Court as early as Forgay v. Conrad, 6 How. 201, 205, 12 L.Ed. 404 when it was said that appealability should be allowed if the effect of an interlocutory order is such that if the order is immediately carried into execution the defendant "may be ruined before he is permitted to avail himself of the right" to appeal. An order sustaining a class action allegation clearly involves issues "fundamental to the further conduct of the case;" (see Gillespie v. United States Steel Corp., 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964); Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945)); the order is also separable from the merits of the case; and irreparable harm to a defendant in terms of time and money spent in defending a huge class action when an appellate court may years later decide such an action does not conform to the requirements of Rule 23, is evident. By this extension or interpretation of *Eisen I* the rule of finality would be given a "practical rather than a technical construction," see *Cohen*, *supra*, 337 U.S. at 546, 69 S.Ct. at 1226; Gillespie v. United States Steel Corp., *supra*, 379 U.S. at 152, 85 S.Ct. at 311; and we would avoid a possible denial of justice caused by delaying review by permitting an interlocutory appeal of rulings either sustaining or striking class action allegations. (See Swift & Company v. Compania Colombiana, 339 U.S. 684, 70 S.Ct. 861, 94 L.Ed. 1206 (1950); Dickinson v. Petroleum Corp., 338 U.S. 507, 70 S.Ct. 322, 94 L.Ed. 299 (1950)).

is not attributable to further proceedings bearing on issues arising under amended Rule 23, a very considerable amount of the time of Judge Tyler and of the lawyers for the respective parties has, in this interval of five years, been devoted to hearings, the taking of depositions, and the preparation and filing of various District Court opinions, preceded by briefs and extensive oral arguments. Much of this time was devoted to an effort by Eisen's counsel to meet the apparently insurmountable difficulties of notice and manageability by adopting the erroneous and frustrating view that some way *must* be found to make the case viable as a class action. In the end Judge Tyler was persuaded that the innovations described by Judge Weinstein in his speeches[2] and in his series of opinions in Dolgow v. Anderson, D.C., 43 F.R.D. 21 (1967); 43 F.R.D. 472 (1968); 45 F.R.D. 470 (1968); 53 F.R.D. 661 (1971); 53 F.R.D. 664 (1971), were authorized by amended Rule 23. These innovations were the preliminary mini-hearing on the merits and the "fluid recovery," both of which will be fully described in due course. It is clear to us that, with or without these innovations, the notice provided by amended Rule 23 to be given "to all members (of the class) who can be identified through reasonable effort" cannot be given, as Eisen refuses to pay or put up any bond to cover this expense, and, if defendants prevail on the merits, they will be unable to recover any amounts expended by them for this purpose. We are also of the opinion that, on the basis of the new evidence now before us, the lawsuit is unmanageable as a class action, and that no preliminary mini-hearing on the merits and no "fluid recovery" procedures are authorized by the text or by any reasonable interpretation of amended Rule 23. Accordingly, we reverse and dismiss the case as a class action. We also vacate the findings of fact and conclusions of law that were made after the preliminary mini-hearing on the merits.

I

The Decision Below—52 F.R.D. 253 1971

In 1968, when the case was previously before us, it was estimated by someone that there were 3,750,000 members of the class, consisting of those who had bought or sold odd lots on the New York Stock Exchange in the period from May 1, 1962 through June 20, 1966. It was then doubtful whether any of the members of the class could be "identified through reasonable effort." Eisen's position then was and now is that, except possibly in the eventuality of the ultimate adoption of Judge Tyler's suggested plan which envisages payment by defendants of 90% of the cost of giving notice, he will not defray any of the expense of giving notice to any of the members of the class, nor will he post any bond to reimburse defendants for any of their disbursements, pursuant to any order of the District Court, made for the purpose of giving any notice.

It now appears that there are 6,000,000 members of the class and of these 2,250,000 can be easily identified.[3] Members of the class reside in every state of the United States and most for-

2. Judge Weinstein's speech on this subject was reported in Weinstein, "The Class Action Is Not Abusive," New York Law Journal, May 1, 1972, p. 1, and May 2, 1972, p. 1.

3. According to the opiuion below, the names and addresses of approximately 2,000,000 class members can be identified. In addition, another 100,000 or more had odd-lot transactions in stocks listed on the Exchange through what is called the "Monthly Investment Plan." These individuals can be identified through computer tapes in a manner similar to that used for locating the 2,000,000. Furthermore, another 150,000 or so public individuals had odd-lot transactions in stocks listed on the Exchange through "payroll deduction plans" operated by Merrill Lynch, Pierce, Fenner & Smith, Inc. Their names and addresses can be identified through the records of Merrill Lynch.

eign countries. They speak and understand a great variety of modern languages. The damages sought to be recovered were estimated at the time we last considered the case at something between a maximum of $60,000,000 and a minimum of $22,000,000.[4] Now the estimate has been raised by Eisen's counsel to 120 millions of dollars.

[1] In our prior opinion we stated unequivocally that actual notice must be given to those whose identity could be ascertained with reasonable effort and that "in this type of case" plaintiff must pay the expense of giving notice to these members of the class.[5] We further stated that if this could not be done there might be no other alternative than the dismissal of the case as a class action. For some reason not clear to us Judge Tyler disregarded these holdings and concluded that he had discretion, even with reference to those members of the class who could be easily identified, to provide for such notice as he thought to be reasonable in the light of the facts of this particular case.

Thus he directed actual notice only to "the approximately 2000 or more class members who had ten or more transactions during the relevant period" and to "5000 other class members selected at random" from the 2,500,000 class members who could easily be identified.[6] With respect to the rest of the 6,000,000 members of the class, Judge Tyler ordered what, without reciting all the details concerning the schedule of proposed publications, we consider to be a totally inadequate compliance with the notice requirements of amended Rule 23. One of the reasons for this was perhaps because Judge Tyler thought of these first notices, by mail and by publication, as merely the first of a series of notices. Judge Tyler then deferred the question of who should pay for this first round of notices until after a "brief" preliminary hearing on the merits. This is what is called the "mini-hearing." We

4. 52 F.R.D. 253, 265 (S.D.N.Y.1971).

5. We did not in our opinion in *Eisen II* intend our statement that "in such a case as this" plaintiff should defray the cost of notice to be dictum, as has been suggested, see Berland v. Mack, 48 F.R.D. 121, 131 (S.D.N.Y.1969). This statement was part of our interpretation of amended Rule 23 as applied in this case, especially with respect to the actual individual notice required by subdivision 23 (c)(2) to be given to those members of the class who could be identified. This was part of our instructions to conduct a hearing on the remand and decide whether the requirements of amended Rule 23 had been or could be met.

Nor did we decide or intend to say that in all cases or under all circumstances plaintiffs in class actions are or must be required to defray the cost of giving the various notices specified in amended Rule 23. This is an action to recover money damages for alleged violations of Section 4 of the Clayton Act and Section 6 of the Securities and Exchange Act of 1934. It is not a derivative stockholder's action asserting a cause of action in favor of a defendant corporation, which regularly sends communications to all the stockholders and may be said to owe its stockholders certain fiduciary duties, nor a case where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund. There may be other similar examples of class actions in which, depending on the circumstances of particular cases, courts might find justification for holding that a representative plaintiff was not obligated to defray the cost of giving the notices required by amended Rule 23. We do not attempt any enumeration. It must be recalled that the provisions for notice in amended Rule 23 were intended to comply with constitutional requirements. See Advisory Committee's Note, 39 F.R.D. 69, 107.

6. Judge Tyler in discussing the notice problems observed that the plaintiff had also offered to send individual notice to all member firms of the New York Stock Exchange and to all commercial banks with large trust departments. This together with the individual notice to the 2000 class members with ten or more transactions and the 5000 selected at random, and the notice by publication, would in Judge Tyler's view "increase the likelihood of reaching a significant portion of the class," and would be in conformity with the requirements of due process.

shall have more to say later about this preliminary mini-hearing on the merits of Eisen's triple damage antitrust claim. Accordingly, the hearing was held "on the issue of the allocation of the costs of notice" and Judge Tyler concluded that the defendants must bear 90% of these expenses.

To describe Judge Tyler's general scheme as it slowly developed in the series of his many opinions [7] following the remand would be too tedious. The sum and substance of it was that he at last realized that it was highly improbable that any great number of claims would, for a variety of reasons, ultimately be filed by the 6,000,000 members of the class. No claimant in the 6 years of the progress of the action had shown any interest in Eisen's claim. The average odd-lot differential on each transaction had been $5.18. The average individual class member engaging in five transactions would have paid a total odd-lot differential of $25.90. Assuming a 5% illegal overcharge the recovery is approximately $1.30, and when trebled the average class member would be entitled to damages of $3.90. As the costs of administration might run into the millions of dollars, it was not likely that a rush of claimants would eventuate no matter how extensive the publication. As he had surmised in the beginning, and as Chief Judge Lumbard stated in his dissent (*Eisen II*, 391 F.2d p. 571), the class action was hopelessly unmanageable. So Judge Tyler tried to pull the case out of this morass by resorting to the "fluid recovery," which had been used as a vehicle for carrying out a voluntary settlement in the Drug Cases, State of West Virginia v. Chas. Pfizer & Co., Inc., et al., 314 F.Supp. 710 (S.D.N.Y.1970).[8]

The concept of this "fluid recovery" is very simple. Having decided that there is no conceivable way in which any substantial number of individual claimants can ever be paid, "the class as a whole" is substituted for the 6,000,000 claimants. Thus the first round of notices becomes relatively unimportant. The scheme adopted envisages the first round of notices as sufficient to get the ball rolling. Little is said about Step Two. This involves a trial of the case to a judge and jury on the merits—not a preliminary mini-trial this time, but a real full scale trial of the private triple damage antitrust case. In some way the damages to "the class as a whole" will be assessed and the defendants, it seems to be assumed, will promptly pay this huge sum into court. This sum is supposed to constitute the "gross damages" to "the class as a whole." With the money in hand, the case begins to resemble the *Transitron* and *Drug Cases* and from then on we are to have the real notices soliciting the filing of claims, the processing of these claims, the fixing of counsel fees and the payment of the general expenses of administration. As "the class as a whole" will include all those who had purchased or sold in the period from mid-1962 to mid-1966 and all those who, at the time of assessing the full damages, were presently purchasing or selling, and those who might in the future purchase and sell, securities in lots of less than 100 shares, it is quite apparent that some of the original 6,000,000 claimants will receive nothing, because they have never heard of the case or for other reasons have failed to file claims and have them processed, and many other new traders, who had no transactions in the period from mid-1962 to mid-1966, will receive some payments. According to Judge Tyler, at least those members of the original class of 6,000,000 who "have maintained their odd-lot activity, will reap the benefits of any recovery" (52 F.R.D. at p. 265). As far as we are aware there has never been, nor can there ever be, a reliable or even rational estimate of how many traders, whether

7. Judge Tyler's opinions following the remand are reported at 50 F.R.D. 471, 52 F.R.D. 253, and 54 F.R.D. 565.

8. Judge Wyatt's approval of the settlement was affirmed by this Court at 440 F.2d 1079 (1971).

speculators or investors, can be said to be expected to continue as such after the lapse of 10 years or so. As it is suspected that relatively few claims will be filed and the damages assessed are supposed to cover the losses of "the class as a whole," there will be a huge residue, similar to the amounts paid to various charities "to advance public health projects" in the *Drug Cases*, and this residue is to be used for the benefit of all odd-lot traders by reducing the odd-lot differential "in an amount determined reasonable by the court until such time as the fund is depleted." 52 F.R.D. at p. 265. We are at a loss to understand how this is to be done, but it is suggested that it "might properly be done under SEC supervision or at least with SEC approval."

Despite its early expression of doubt on the subject,[9] and what appears at least to be *de facto* exercise of supervisory powers over Rules or practices on the subject of the amount and uniformity of the rate of commissions on odd-lot purchases and sales, the SEC finally did exercise such powers [10] and we hold that at all times the SEC possessed such powers under Sections 11(b) [11] and 19(b) [12] of the Securities Exchange Act of 1934. No District Court has authority to decide upon the rate of such commissions to take effect until the exhaustion of any residual fund left over by application of a "fluid recovery" in a private triple damage antitrust case, after the payment of claims in a class action or otherwise. The courts may review rulings of the SEC, but they have no more power than the District Court to fix any such rates in the first place or to give directions to the SEC concerning the fixing of such rates or the time within which such rates are to be effective, as part of a judgment in a private triple damage antitrust case.

II

Disposition of Certain Contentions of the Parties

Solely for the purpose of making our holdings clear in this difficult and complicated case we think it proper first to dispose of certain contentions of the parties.

A

[2] We must reject Eisen's claim that the fluid class recovery theory is not ripe for review. Indeed, there is no way to side-step this issue. We specifically remanded the case for consideration of the problem of manageability. The further proceedings on the remand were necessarily concerned with ascertaining whether there was a judicially sound way effectively to administer this action. Administration, of course, includes proof of damages and the distribution of the same. As we point out later in this opinion, Eisen concedes that the action is not manageable if fluid class recovery is not permissible. We

9. According to the Report of the Special Study of Securities Markets, Vol. I, p. 182 (1963), an attorney representing the odd-lot firms presented a proposal for an increased differential. The Director of the Division of Trading and Exchange expressed some doubt as to the Securities and Exchange Commission's jurisdiction over the matter. The Report states that "(t)he Commission declined to decide the jurisdictional question but stated that it had no objection to the proposal. It is to be noted that neither the Exchange nor the Commission asserted jurisdiction, the former denying its jurisdiction and the latter expressing doubts, yet each informally acquiesced in the increase." See also p. 200 of the Report.

10. At the preliminary hearing defendants' Exhibit C contained a letter from the SEC to the New York Stock Exchange dated June 16, 1966. In part the letter stated that the "Commission hereby makes written request pursuant to section 19(b) of the Securities Exchange Act that the Exchange effect on its own behalf changes in its rules and practices in respect of odd-lot purchases and sales, and the fixing of reasonable rates of commission and other changes in connection therewith, to fix odd-lot differentials * * *."

11. 15 U.S.C., Section 78k(b).

12. 15 U.S.C., Section 78s(b).

must face this issue if we are to pass on the question of manageability, which is the most important point in the case. We are no longer at the early stages of this case where it might be possible to put off to a later time the troublesome question of what to do with the damage fund if only a small number of claims are filed against the fund. See In Re Antibiotic Antitrust Actions, 333 F. Supp. 278, 281–282 (S.D.N.Y.1971).

B

[3] Moreover, we think the three cases cited by Judge Tyler as "respectable precedent" for fluid class recovery are all distinguishable. These three cases are: Bebchick v. Public Utilities Commission, 115 U.S.App.D.C. 216, 318 F.2d 187, cert. denied, 373 U.S. 913, 83 S.Ct. 1304, 10 L.Ed.2d 414 (1963); the *Drug Cases*, 314 F.Supp. 710 (S.D.N.Y.), aff'd 440 F.2d 1079 (2d Cir. 1971); and Daar v. Yellow Cab Company, 67 Cal.2d 695, 63 Cal.Rptr. 724, 433 P.2d 732 (1967).

Judge Wyatt's extraordinary feat of judicial administration in carrying out the terms of the one hundred million dollar settlement in the *Drug Cases* deserves all the praise it has received. But it was a consensual affair made possible by the agreement of the parties and without objection to the assumption by the District Court of jurisdiction to accept and administer the fund. Here we have no fund. There is no settlement. Every issue is contested and litigated. And authority to permit this action to proceed as a class action must be found within the four corners of amended Rule 23, as interpreted in the Reviser's Note. Applying this test we hold Eisen's class action must be dismissed. *Bebchick* was not a class action in any sense of the word. Amended Rule 23 was not involved. In the exercise of its powers of review, the Court of Appeals for the District of Columbia Circuit reversed a judgment of the District Court approving the action of the Public Utilities Commission of the District of Columbia supporting a fare increase by the transit company. In the meantime, the additional cash fares, now found to be illegal, had been collected. There was no way to direct refunds as those who paid these cash fares could not be identified. So, also in the exercise of its powers of review the Court of Appeals directed the amount of these additional cash fares to be set up in the books of the transit company to be used, in the discretion of the regulatory commission "to benefit bus riders as a class in pending or future rate proceedings." We cannot find that this case has any bearing on any of the issues in this amended Rule 23 case. Finally, *Daar* was a case arising under a state class action statute very different in its phraseology from amended Rule 23. The ruling was made on a demurrer to the complaint so the approach to the legal issues was entirely different from the making of a judicial determination, on the basis of proof, of whether or not the requirements of amended Rule 23 had been met. Moreover, the court was evidently of the view that the individuals who had been damaged by the alleged overcharge in taxi fares would ultimately have to prove their separate and individual damages. 433 P.2d at 740.

For the reasons stated in this opinion we disagree with the holding in the *Dolgow* cases.

C

The Merits of Eisen's Triple Damage Antitrust Claim

[4] The defendants by extensive and even cogent arguments have urged us not only to vacate Judge Tyler's findings and conclusions on the merits of the case but to decide that there is no merit in Eisen's antitrust claim. Thus the defendants argue that in the context of an antitrust suit brought against defendants acting within a self-regulatory industry the *per se* rule of antitrust liability is inapplicable, and that even under a rule of reason the practices of the odd-lot defendants and the Exchange

were not violative of the antitrust laws. In essence the defendants contend that Judge Tyler incorrectly applied the Silver v. New York Stock Exchange, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963) doctrine, and should have concluded that the fixing of the odd-lot differential is necessary to the proper implementation of the Securities Act. Also the defendants assert that the Securities and Exchange Commission has primary jurisdiction over the substantive issues presented in this litigation. As already appears in this opinion, we hold and decide that the SEC does possess supervisory powers over the amount and uniformity of the commissions to be paid on odd-lot purchases and sales. But this is only part of the picture. There are many facets to this complicated case. We feel it is proper for us to say only that the record before us constitutes no proper basis for any decision of the merits, tentative or otherwise.

III

Controlling Principles

When discoursing on the arts or belles-lettres colorful language stimulates the imagination, beguiles one into useful symbolism and opens up the avenues to creative thought. But in the process of rationalizing legal conclusions and arriving at a sound and proper determination of questions of the interpretation of statutes, procedural rules and constitutional limitations, clichés and rhetorical devices generally miss the mark. Something more substantial is necessary to establish a base for the proper decision of difficult and complex questions of law. One reason for this is that the solution is found more often than not by the application of fundamentally simple principles.

Thus statements about "disgorging" sums of money for which a defendant may be liable, or the "prophylactic" effect of making the wrongdoer suffer the pains of retribution and generally about providing a remedy for the ills of mankind, do little to solve specific legal problems. The result of this approach is almost always confusion of thought and irrational, emotional and unsound decisions. In cases involving claims of money damages all litigation presumes a desire on the part of the judicial establishment to make the wrongdoer pay for the wrongs he has committed, but to do this by applying settled or clearly stated principles of law, rather than by some process of divination. Punishment of wrongdoers is provided by law for criminal acts in statutes making it a crime punishable by fine or imprisonment to violate the antitrust laws. In certain civil suits punitive damages may be awarded; and in private antitrust cases the possible recovery of triple the loss actually suffered by a plaintiff is very properly praised as a supplementary deterrent. But none of these considerations justifies disregarding, nullifying or watering down any of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23. It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions,[13] including oppressions by those whose intentions may be above reproach.

[5] We adhere to what we have written in support of the remand of this

13. The procedural safeguards we speak of were wisely embodied in the Fifth Amendment's Due Process Clause. The importance of due process of law and procedural fairness has been emphasized by some of our leading jurists. Justice Brandeis observed that "in the development of our liberty insistence upon procedural regularity has been a large factor." (Burdeau v. McDowell, 256 U.S. 465, 477, 41 S.Ct. 572, 576, 65 L.Ed. 1048 (1921) (dissenting opinion)). Justice Frankfurter also remarked that "(f)airness of procedure is 'due process in the primary sense * * *.' It is ingrained in our national traditions." (Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 161, 71 S.Ct. 624, 643, 95 L.Ed. 817 (1951) (concurring opinion)).

case in *Eisen II*. On the basis of the new evidence adduced on the remand, what we are now doing is interpreting and applying various provisions of an amended and improved procedural device intended to facilitate the judicial disposition of the individual claims of the separate members of a class of persons so numerous that joinder of all members is impracticable. Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that "such rules shall not abridge, enlarge or modify any substantive right."[14]

The applicable substantive law is Section 4 of the Clayton Act[15] that authorized the private triple-damage antitrust suit to recover damages by a person who has been "injured in his business or property" by reason of a violation of the antitrust laws. That the claims of many may not be treated collectively or as "the class as a whole" is what the Supreme Court decided in Snyder v. Harris, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969), where plaintiff, in a diversity case sued as representative of a class of some 4000 shareholders of an insurance company. Her individual claim was for less than $10,000. She was not permitted to aggregate her claim with the separate claims of the other members of the class which amounted to $1,200,000. Despite the fact that amended Rule 23 was aleady in effect, the case was dismissed. Moreover, in the recent case of Hawaii v. Standard Oil Co. of California, et al., 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972),[16] it was again held that only persons actually injured in their business or property could claim damages under the Clayton Act.

Eisen also alleges that the Exchange is liable for its failure to regulate the odd-lot differential as required by Section 6 of the Securities Exchange Act. He argues that Section 6, 15 U.S.C., Section 78f, requires the securities exchanges to prescribe rules and regulations for the regulation of the industry. Failure so to regulate allegedly subjects the defendant-Exchange to liability to those who have suffered injury due to the abdication of this regulatory responsibility. The duty to regulate emanates from the Exchange Act, but the right of an injured party to recover damages is, according to Eisen, based upon federal common law, J. I. Case Co. v. Borak, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); Baird v. Franklin, 141 F.2d 238 (2d Cir.), cert. denied, 323 U.S. 737, 65 S.Ct. 38, 89 L.Ed. 591 (1944). Thus, if Eisen is correct and Section 6 of the Act creates a statutory duty on the Exchange to protect members of plaintiff's class, then these members "may sue for injuries resulting from its breach and (the) common law will supply a remedy if the statute gives none," Baird v. Franklin, 141 F.2d at 245.

The fundamental doctrine that permeates our opinion in *Eisen II*, and which we are now about to apply again in this same case, is whether the requirements of amended Rule 23 have been met. We find no helpful analogy in the procedures that have been used for generations in connection with preliminary injunctions or other provisional remedies intended to preserve the *status quo*.

14. 28 U.S.C., Section 2072.

15. 15 U.S.C., Section 15.

16. The District Court in Hawaii v. Standard Oil Co., 301 F.Supp. 982 (D. Hawaii, 1969) dismissed the class action allegation on the ground that "under the circumstances * * *, the class action based upon the injury to every individual purchaser of gasoline in the State, * * in the context of the pleadings, would be unmanageable." Hawaii, however, decided not to appeal this ruling to the Ninth Circuit, and, of course, the ruling was not before the Supreme Court for review in Hawaii v. Standard Oil Co., 405 U.S. 251, 256, n. 6, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972).

So, we shall proceed to examine in some detail the provisions of amended Rule 23 in the light of the long and explicit Advisory Committee's Note, 39 F. R.D. 98, and decide whether or not Judge Tyler has followed our directions to appraise and to apply each of the factors enumerated on the face of the Rule. In the light of our conclusions with respect to notice and manageability, we do not reach the subject of adequate representation.

IV

Lack of Individual Notice to "All Members Who Can be Identified Through Reasonable Effort"

[6] Our prior ruling in *Eisen II* is clear and specific. If identification of any number of members of the class can readily be made, individual notice to these members must be given and Eisen must pay the cost. If this cannot be done, the case must be dismissed as a class action. Amended Rule 23(c)(2) unambiguously states that notice to the class generally shall be the "best notice practicable," and then "including individual notice to all members who can be identified through reasonable effort." Moreover, the Advisory Committee's Note states (39 F.R.D. 106–107): "Indeed, under subdivision (c)(2), notice must be ordered, it is not merely discretionary * * *."[17] While Judge Tyler seems to have realized that this phase of amended Rule 23 has decided constitutional overtones, he apparently thought the flexibility of the Rule and our statement that the Rule was to be given a liberal interpretation authorized him to exercise his discretion even if this involved the complete disregard of our specific and unambiguous ruling on the subject of actual individual notice to identifiable members of the class. This ruling alone compels a reversal of the order appealed from and the dismissal of the case as a class action.

V

The Preliminary Mini-Hearing on the Merits Was Not Authorized by Amended Rule 23 and the District Court Had No Jurisdiction or Competence to Hold Such a Hearing

[7] The Federal Rules of Civil Procedure set forth a considerable variety of procedural devices designed for the disposition of cases on the merits. There may be traditional trials to a judge or to a judge and jury; there may be summary judgments, dismissals with or without prejudice for failure to state a claim and so on. But neither in amended Rule 23 nor in any other rule do we find provision for any tentative, provisional or other makeshift determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter such as which party is to be required to pay for mailing, publishing or otherwise giving any notice required by law. In most cases the so-called tentative findings and conclusions arrived at without the salutary safeguards applicable to all full scale trials on the merits will be extremely prejudicial to one or the other of the parties who bear the brunt of such findings and conclusions, and such prejudice may well be irreparable.

17. The *Drug Cases*, *supra*, 314 F.Supp. 710 (S.D.N.Y.1970), aff'd 440 F.2d 1079 (2d Cir. 1971), contain nothing that gives support to Judge Tyler's ruling that individual notice to a limited number of members of a group of 2,250,000 whose names and addresses were identified was sufficient compliance with the notice requirements of amended Rule 23. An examination of the briefs in the *Drug Cases* makes it clear that reasonable effort would not have uncovered the names and addresses of the members of the consumer class of persons who bought the drugs on prescription at drug stores. Therefore, publication as to the consumer class was deemed sufficient. Moreover, as appellant in the *Drug Cases* attacked the sufficiency of the notice to the members of the wholesaler-retailer class, this Court rejected this argument, observing that individual notice was sent by mail to each and every member of this class whose name was available. 440 F.2d at 1091.

[8] We agree with the ruling by the Fifth Circuit in Miller v. Mackey International, Inc., 452 F.2d 424 (5th Cir. 1971), that the preliminary hearing on the merits was improper. As stated by Judge Wisdom, 452 F.2d at page 427:

> In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.

This was the first time, as far as we are aware, that any Court of Appeals has passed on the point. As noted by Judge Wisdom in footnote 5 on page 429 of 452 F.2d, this Court did not have occasion to rule on the question when it decided the appeal from Judge Weinstein's summary judgment for defendants in *Dolgow*, 438 F.2d 825 (2d Cir., 1971). While Judge Weinstein's oral order not only granted summary judgment for defendants but also held the case not to be a proper class action, the posture of the case on the appeal to our Court was such that the Court had no occasion to consider the propriety of the preliminary mini-hearing on the merits that had been conducted by Judge Weinstein. Nor was that question before this Court in Green v. Wolf Corporation, 406 F.2d 291 (1968). See footnote 15 on pages 301–302.

Of the few District Court decisions on the point most of these disagree, as, of course, does the Fifth Circuit, with the innovations described in *Dolgow*,[18] and there is little to commend the reasoning or lack of reasoning in the others.[19] No provision is made in amended Rule 23 for any such mini, preliminary or other hearing on the merits. It does violence to the whole concept of summary judgment, and cannot be reconciled with the requirement in Rule 23 that "as soon as practicable after the commencement of the action" the question of class suit *vel non* be decided.

Moreover, in this case we did not in our disposition of the prior appeal intend to relinquish to the District Court any jurisdiction to pass on the merits of the case but only to decide if the requirements of amended Rule 23 had been met. Accordingly, we are constrained to hold that the whole preliminary mini-hearing on the merits proceeding, including the findings of fact and conclusions of law, was conducted and made without jurisdiction.

VI

As a Class Action the Case Is Unmanageable

From the beginning it has been Judge (then Chief Judge) Lumbard's view that as a class action the case is unmanageable and that it should be dismissed as a class action. It turns out that he was right. As soon as the evidence on the remand disclosed the true extent of the membership of the class and the fact that Eisen would not pay for individual notice to the members of the class who could be identified, and the evidence fur-

18. Decisions which have rejected the use of a preliminary hearing on the merits to decide the propriety of litigation proceeding as a class action include: Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir.), cert. denied Glen Alden Corp. v. Kahan, 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970); Katz v. Carte Blanche Corp., 52 F.R.D. 510 (W.D.Pa.1971); Fogel v. Wolfgang, 47 F.R.D. 213 (S.D.N.Y.1969); Cannon v. Texas Gulf Sulphur Co., 47 F.R.D. 60 (S.D.N.Y.1969); Mersay v. First Republic Corp. of America, 43 F.R.D. 465 (S.D.N.Y.1968). Judge Mansfield took the opportunity in Berland v. Mack, 48 F.R.D. 121, 132 (S.D.N.Y.1969) to comment on the preliminary hearing on the merits: "The suggestion that such abuse of the corporate treasury can be avoided by a preliminary hearing to determine the merits of the claim is illusory. Quite aside from the additional burden that it heaps upon the Court, it would be a rare case where the Court could assure the class of ultimate success even after a preliminary hearing."

19. Cases supporting a preliminary hearing on the merits are Milberg v. Western Pacific Railroad Co., 51 F.R.D. 280 (S.D.N.Y.1970), appeal dismissed, 443 F.2d 1301 (2d Cir. 1971), and, of course, Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y.1968).

ther disclosed that the class membership was of such diversity and was so dispersed that no notice by publication could be devised by the ingenuity of man that could reasonably be expected to notify more than a relatively small proportion of the class, a ruling should have been made forthwith dismissing the case as a class action. This dismissal could have saved several years of hard work by the judge and the lawyers and wholly unnecessary expense running into large figures. The fact that the cost of obtaining proofs of claim by individual members of the class and processing such claims was such as to make it clear that the amounts payable to individual claimants would be so low as to be negligible also should have been enough of itself to warrant dismissal as a class action. Other cases involving millions of diverse and unidentifiable members of an alleged class had been dismissed as unmanageable or altered in composition.[20] And so even *Eisen* and his counsel conceded that the class was not manageable unless the "fluid recovery" procedures were adopted.

Thus, in the language of Eisen's counsel:

> There are some six million persons in the class. If each had to present his own personal claim for damages, the class, indeed, would not be manageable. The facts in Stipulation No. 2 only underscore the obvious. In both Cherner v. Transitron Electronic Corporation, 201 F.Supp. 934 (D. Mass.1962) and Illinois Bell Telephone Co. v. Slattery, 102 F.2d 58 (7th Cir. 1939). (the cases included in Stipulation No. 2), the refund process overwhelmed the refunds. And both cases involved, quite obviously, classes much smaller than the class at bar.

[9] Where there are millions of dispersed and unidentifiable members of the class notices by publication giving the essential information required by amended Rule 23 are a farce.[21] And, when it comes to the filing and processing of claims, lawyers specializing in class actions have stated that the only effective way to induce any reasonable number of members of the class to file claims is to conduct full-scale campaigns on TV and radio, solicit appearances by advocates of consumers' rights such as Ralph Nader, letters from Congressmen to their constituents, public statements by various state attorneys general "and coverage in various news media, union newsletters and the like," also to persuade the Federal Communications Commission to classify announcements of this character as "public service announcements."[22]

All the difficulties of management are supposed to disappear once the "fluid recovery" procedure is adopted. The claims of the individual members of the class become of little consequence. If the damages to be paid were only the aggregate of the sums found due to individual members of the class, after their claims had been processed, it is

20. See, City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J.1971); United Egg Producers v. Bauer International Corp., 312 F.Supp. 319 (S.D. N.Y.1970); Hackett v. General Host Corp., Civil No. 70-364 (E.D.Pa.1970), appeal dismissed, 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925, 92 S.Ct. 2460, 32 L.Ed.2d 812 (1972); Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 461 (E.D.Pa.1968).

21. Notice by publication has been sanctioned as consistent with due process of law under certain circumstances, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). But in Schroeder v. City of New York, 371 U.S. 208, 212-213, 83 S.Ct. 279, 282, 9 L.Ed.2d 255 (1962) the Court refined the *Mullane* rule: "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."

22. These suggestions were made and discussed in Shapiro, "Consumer Participation in Antitrust Class Action Part II", New York Law Journal, May 31, 1972, p. 1.

fairly obvious that in cases like *Eisen* the expenses of giving the notices required by amended Rule 23 and the general costs of administration of the action would exceed the amount due to the few members of the class who filed claims and the individual members of the class would get nothing.[23] We referred to this possibility in our opinion in *Eisen II*, 391 F.2d at pages 567 and 570.

[10] But if the "class as a whole" is or can be substituted for the individual members of the class as claimants, then the number of claims filed is of no consequence and the amount found to be due will be enormous, affording, we are told, plenty of money to pay all expenses, including counsel fees, and a residue so large as to justify reduction of the odd-lot differential for years in the future, for the benefit of all traders, past, present and future, who are to be considered to be members of "the class as a whole."

Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. But as it now reads amended Rule 23 contemplates and provides for no such procedure. Nor can amended Rule 23 be construed or interpreted in such fashion as to permit such procedure. We hold the "fluid recovery" concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.

VII

A Few General Observations

Perhaps in part due to the liberal views on the subject of amended Rule 23, as expressed in our opinion in *Eisen II*, and doubtless stimulated by the counsel fees allowed in the *Transitron* and the *Drug Cases*, where large voluntary settlements had been approved and administered by District Judges, there has followed such a quantity of comment pro and con on the questions of law we are to decide in this case, by law professors, by judges, and especially by lawyers specializing in class actions, expressed in numerous articles, opinions and published speeches, that the task of even attempting to enumerate all of these for purposes of documentation is too much for us.

Class actions have sprouted and multiplied like the leaves of the green bay tree. No matter how numerous or diverse the so-called class may be or how impossible it may be ever to compensate the individual members of the class, a champion steps forth. Thus class actions have been brought "on behalf of all subscribers of business telephones in New York County, all Master Charge credit card holders similarly situated, all consumers of gasoline in a given state or states, all homeowners in the United States, and even all people in the United States."[24] So far as we are aware not a single one of these class actions including millions of indiscriminate and unidentifiable members has ever been brought to trial and decided on the mer-

23. The recent draft for the Manual for Complex Litigation suggests that problems of administering the class action should not justify denial of an appropriate class action request "except when the attention and resources required to be devoted strictly to administrative matters will frustrate the securing of ultimate relief to which the class members may be entitled." (p. 36). Due to our rejection of the fluid class recovery concept, we are compelled to conclude that this litigation falls squarely within this exception contemplated in the Manual. The administrative problems posed by this action will frustrate any effort to provide the individual class members with compensation for the alleged injuries.

24. In the Report and Recommendations of the Special Committee of the American College of Trial Lawyers on Rule 23 of the Federal Rules of Civil Procedure, issued March 15, 1972, this quotation appears on p. 6 with supporting citations.

its. But the preliminary procedures, including the preliminary mini-hearing on the merits, such as those conducted by Judge Tyler in order to decide whether or not this case was a proper class action, and the huge and unavoidable expense of producing witnesses and documents pursuant to discovery orders, have brought such pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits of the claim.[25]

The *"in terrorem"* effects of the innovations described in *Dolgow* have been highly praised by those who invented or applied them.[26] But Professor Milton Handler, whose Annual Antitrust Review has for many years brought his expertise in Trade Regulation and, we are happy to say, some entertainment to the members of the Association of the Bar of the City of New York, and to the members of the Bench and Bar in general, minces no words. He calls these procedures "legalized blackmail."[27] There is reason to believe that the practical effect of these procedures, and the fact that possible recoveries run into astronomical amounts, generate more leverage and pressure on defendants to settle, even for millions of dollars, and in cases where the merits of the class representatives claim is to say the least doubtful, than did the old-fashioned strike suits made famous a generation or two ago by Clarence H. Venner.

And yet, even if amended Rule 23 furnishes no satisfactory solution in situations where immense numbers of consumers have been mulcted in various ways by illegal charges, it would seem that some means should be provided by law for the redress of these wrongs to the community and to society as a whole. The numerous decisions by courts in these class action cases have at least exposed the lack of adequate remedy under existing laws. From our extensive study of the whole situation in working on this *Eisen* case it would seem that amended Rule 23 provides an excellent and workable procedure in cases where the number of members of the class is not too large. It seems doubtful that further amendments to Rule 23 can be expected to be effective where there are millions of members of the class, without some infringement of constitutional requirements. The problem is really one for solution by the Congress. Numerous administrative agencies protect consumers in various ways. It should, we think, be possible for the Congress to create some public body to do justice in the matter of consumers' claims in such fashion as to afford compensation to the injured consumer. If penalties are to be imposed upon wrongdoers, at least let the Congress decide how the money is to be spent.

Another possibility, suggested by the Report and Recommendations of the Special Committee of the American College of Trial Lawyers, is a further amendment to amended Rule 23 consisting of a new subdivision providing:

> In an action commenced pursuant to subdivision (b)(3), the court shall consider whether justice in the action would be more effectively served by maintenance of the action as a class

25. *Id.*, at 16. See also, Morris v. Burchard, 51 F.R.D. 530, 536 (S.D.N.Y.1971).

26. See, Dolgow v. Anderson, 43 F.R.D. 472, 487 (E.D.N.Y.1968); Miller, Problem in Administering Relief In Class Actions Under Federal Rule 23(b)(3), 54 F.R.D. 501, 508; Pomerantz, New Developments in Class Actions—Has Their Death Knell Been Sounded?, 25 Bus. Lawyer 1259 (1970).

27. Handler, The Shift From Substantive to Procedural Innovations in Antitrust Suits—The 23rd Annual Antitrust Review, 71 Colum.L.Rev. 1, 9 (1971). See also, Professor Handler's 24th Annual Antitrust Review, 72 Colum.L.Rev. 1, 34–42, in which he criticizes the fluid recovery procedure as sought to be applied in "class" actions. There are some additional trenchant comments in his 25th Annual Antitrust Review, published in the December, 1972 issue of The Record of the Association of the Bar of the City of New York, pp. 660 ff.

action pursuant to subdivision (b)(2) in lieu of (b)(3).

The procedure involved in applying for prospective injunctive relief is relatively simple and inexpensive, social and economic reforms may be implemented and an end put to illegal practices with far more benefit to the community than that derived from minimal or token payments to individual members of a class. Attorney's fees in such cases should also provide adequate incentive to counsel for the representative or representatives of the class.[28]

Conclusion

For the reasons stated in this opinion the findings and conclusions following the mini-hearing are vacated and set aside, the various rulings of the District Court sustaining the prosecution of the case as a class action are reversed and, as a class action, the case is dismissed, without prejudice to the continuance of so much of the claim asserted in the complaint as refers to Eisen's alleged individual rights against the defendants.

HAYS, Circuit Judge (concurring in the result):

I concur in the result because I am unable to accept the ruling of the district court requiring the defendants to pay 90 per cent of the cost of notice, since, if the defendants should finally prevail, they would not be reimbursed for this expenditure.

ON PETITION FOR REHEARING.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A petition for a rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for plaintiff-appellee, a poll of the judges in regular active service having been taken at the request of such a judge, and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Judges Hays, Oakes and Timbers dissent.

/s/ HENRY J. FRIENDLY
Chief Judge

KAUFMAN, Circuit Judge, with whom FRIENDLY, Chief Judge, and FEINBERG, MANSFIELD, and MULLIGAN, Circuit Judges, concur.

I vote against en banc, not because I believe this case is unimportant, but because the case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction. Judge Oakes's opinion, dissenting from the denial of en banc, illustrates some of the far-reaching implications the panel's opinion might have on the initiation and administration

28. In his recent book Federal Jurisdiction: A General View, containing his 1972 Columbia University James S. Carpentier Lectures, Chief Judge Friendly makes this comment on class actions pursuant to amended Rule 23, at page 120, omitting footnotes:

> Something seems to have gone radically wrong with a well-intentioned effort. Of course, an injured plaintiff should be compensated, but the federal judicial system is not adapted to affording compensation to classes of hundreds of people with $10 or even $50 claims. The important thing is to stop the evil conduct. For this an injunction is the appropriate remedy, and an attorney who obtains one should be properly compensated by the defendant, although not in the astronomical terms fixed when there is a multimillion dollar settlement. If it be said that this still leaves the defendant with the fruits of past wrong-doing, consideration might be given to civil fines, payable to the government, sufficiently substantial to discourage engaging in such conduct but not so colossal as to produce recoveries that would ruin innocent stockholders or, what is more likely, produce blackmail settlements. This is a matter that needs urgent attention.

of certain class action litigation in the future. En banc consideration by this court, however, would merely serve as an instrument of delay. Moreover, the application for certiorari will not go to the Supreme Court barren of the views of the judges of this court as, for example, in the Pentagon Papers case, where the court convened en banc but, because of urgent time considerations, did not write opinions. Judge Oakes has set forth his views on the merits with vigor and Judge Medina's panel opinion articulates the opposing position. Our decision to decline en banc consideration of this case in no way implies, as my brother Oakes suggests, the demise of en banc in future cases of exceptional importance; nor does it threaten to turn this collegial court into a fragmented judicial body of panels of three, in which each panel's opinions speak only for the panel, and not for the whole Court. Instead, we wisely speed this case on its way to the Supreme Court as an exercise of sound, prudent and resourceful judicial administration.

MANSFIELD, Circuit Judge:

I concur in Judge Kaufman's opinion.

The issues raised by this appeal are of exceptional importance and therefore deserving of the most authoritative resolution possible. If the recent history of *en banc* proceedings in this Court is any indication, however, an *en banc* hearing would result in opinions expressing diverse views, necessitating ultimate resolution by the Supreme Court. See, e. g., Rodriguez v. McGinnis, 456 F.2d 79 (2d Cir. 1972), reversed sub nom. Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). In the meantime one year's delay would be added to this already protracted proceeding. This predicament might be avoided by granting the petition and, with the case then before us *de novo*, invoking the Supreme Court's jurisdiction through the rarely used procedure provided by 28 U.S.C. § 1254(3), which empowers us *sua sponte* to certify grave questions to it for final decision where we believe the answers to be in doubt. See 28 U.S.C. Rules 28–29, Revised Rules of the Supreme Court (1973 Supp.); Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 728–729, 49 S.Ct. 499, 73 L.Ed. 918 (1929). However, since I am persuaded that the Supreme Court, in view of the far-reaching significance of the issues, will in all likelihood grant certiorari, I believe that such a procedure is unnecessary. Otherwise I would agree with Judge Oakes' forceful plea for an *en banc* hearing.

HAYS, Circuit Judge (dissenting):

I believe that this case should be reconsidered en banc.

OAKES, Circuit Judge (dissenting from the denial of rehearing en banc), with whom TIMBERS, Circuit Judge, concurs:

For this court not to hear a matter of this significance is to render the en banc statute [1] a nullity. One may in this era of burgeoning appellate business quite plausibly take the view that the en banc procedure should not be used "merely" to correct individual injustices [2] or mis-

1. Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof. 28 U.S.C. § 46(c).

2. Occasionally a vote to rehear a panel opinion en banc has been effective in the administration of individual justice. *See* United States ex rel. Whitmore v. Malcolm, 476 F.2d 363 (2d Cir., 1973), slip op. at 1615 (2–1 decision), where following this court's vote to rehear en banc a panel opinion affirming a denial of habeas corpus and with the rehearing en banc pending before us, the State prosecutor dismissed the case against the appellant, thereby mooting the appeal.

takes, but only in a case where the panel decision [3] is in serious conflict with prior decisions of the particular Circuit Court of Appeals or where it is of extreme importance. Even with that view, however, this case, if no other decided in recent years, qualifies for en banc treatment. I say this for the following reasons which I will enumerate, adding a few comments subsequently:

1. The case is extremely important and vitally affects class actions, particularly environmental and consumer actions, affecting large numbers of citizens.

2. The panel opinion reaches a result which is very doubtful to say the least; on its face the opinion appears to nullify much of Fed.R.Civ.P. 23.

3. The case should be heard en banc; the procedure is there and presumably is to serve some purpose, and the Supreme Court has admonished the Courts of Appeal to make use of it.

4. There are no compelling reasons for not hearing the case en banc.

The Case Is of Extreme Importance; It Vitally Affects Class Actions.

I would expect that the case would be conceded by each and every one of the judges voting to deny en banc treatment, if he were polled, to be of extreme importance. Judge Kaufman's opinion makes this concession.

The panel opinion defines as unmanageable any case involving a large class where actual notification of readily ascertainable members is expensive. It calls notice by publication to a large class a "farce" and casts constitutional doubts on any other construction of Rule 23. The case accordingly affects adversely much consumer and environmental litigation, as well as all antitrust and other claims by numbers of little people for small amounts.[4] The panel opinion seems on its face to give a green light to monopolies and conglomerates who deal in quantity items selling at small prices to proceed to violate the antitrust laws, unhampered by any realistic threat of private consumer civil proceedings, leaving it to some vague future act of Congress to protect the innocent consumer. The panel opinion as I read it tells polluters that they are pretty safe from class actions because even if a whole city is blanketed in smoke or its water supply contaminated, the plaintiffs can never advance the money for notices to, say, all the people in the city phone book, who certainly are identifiable. I will not belabor the point of importance.

The Panel Opinion Reaches a Very Doubtful Result.

To vote in favor of rehearing a case en banc should not necessarily mean that the judge is thereby committed to overturn the panel opinion as Judge Timbers pointed out dissenting from the denial of rehearing en banc in Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir.), rehearing en banc denied, 469 F.2d 1033, 1041, n.1 (2d Cir. 1972) (dissenting opinion of Timbers, J., joined by Oakes, J.), cert. granted, 410 U.S. 925, 93 S.Ct. 1370, 35 L.Ed.2d 585 (1973) (No. 72-888). At the same time, if one agrees fully with the panel decision one does not generally vote to hear it en banc. I

3. I speak of a panel decision as one by three judges sitting on a Court of Appeals.

4. I say "little people" because bigger investors don't generally deal in odd lots. They prefer to avoid the price differential in brokerage fees by dealing in lots of 100 or more. It is interesting to contrast this case with Lanza v. Drexel, 479 F.2d 1277 (2d Cir., 1973), (en banc), where this court did en banc and reverse a panel ruling that had a bearing, although in quite a limited factual situation in my opinion, on the liability for Securities Act violations of directors unconnected with management but highly involved financially. The panel opinion's decision here was partially reached in the name of fairness to defendants who thereby may retain, if the plaintiff's allegations are proven, profits obtained by violation of the antitrust laws. As I compute the cost of mailing readily identifiable members of the class from Judge Tyler's opinion, it was just over ten cents apiece or $218,750. 52 F.R.D. at 263.

take the view that it is only when there is reasonable doubt on a point, or the question or questions are unresolved in the judge's mind, that he should vote for en banc, and then only in unusual or extremely important cases, or cases which conflict with prior decisions of this circuit or the Supreme Court.

Serious questions about the panel's conclusions as to the management of class actions exist. Class actions, I had thought, were "an invention of equity . . . mothered by the practical necessity" of providing a practical procedure to enable large numbers of litigants to enforce their common rights. Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948). *See* C. Wright, Federal Courts 306 (2d ed. 1970); Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv.L.Rev. 356, 375 et seq. (1967). The panel's decision seems utterly inconsistent with the flexible, equitable spirit that motivated the innovative 1966 amendments to Fed.R.Civ.P. 23.

The panel opinion is at the very least highly debatable on its face since it requires, without even considering division of a large class into a much smaller subclass under Rule 23(c)(4)(B), an individual plaintiff to pay the cost of actual notice to the identifiable members of the entire class which he seeks to represent and since it declares—I may add without any support or citation of authority whatsoever other than judicial fiat—that "Where there are millions of dispersed and unidentifiable members of the class notices by publication giving the essential information required by amended Rule 23 are a farce." Op. at 1017.

The view of *Eisen II*, 391 F.2d 555 (1968), that Rule 23(c)(2) requires individual notice to all members of Eisen's class who can be identified through "reasonable effort" has been criticized as "unnecessarily restrictive . . . ." 7A C. Wright & A. Miller, Federal Practice and Procedure § 1786 at 148 (1972); *see also* Kaplan, *supra*, 81 Harv.L.Rev. at 396; Comment, Class Actions under Federal Rule 23(b)(3)—The Notice Requirement, 29 Md.L.Rev. 139 (1969). Certainly given the importance of the class action as a means for the little man to bring wealthy or powerful interests into court, Eisen's inability to bear the costs of mailing notice to those 2,000,000 or so "easily identifiable individuals" similarly situated, Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 257 (S.D.N.Y. 1971), should not necessarily terminate the class action character of this suit. It may be appropriate, as Judge Tyler suggested below, to charge the defendants with a portion of the notification costs. *See* Dolgow v. Anderson, 43 F.R.D. 472, 498–500 (E.D.N.Y.1968) (Weinstein, J.); C. Wright, *supra* at 313–14. But even if these two questions were decided against the plaintiff, an en banc decision drawing sustenance from the flexible, still developing Rule 23 jurisprudence might embrace one of several other alternatives to the panel's burial of larger-number plaintiff class actions. These include the alternatives suggested by Judge Weinstein and others discarded in the panel opinion. But there are others, too.

The plaintiff class might, for example, be divided into much smaller subclasses, Fed.R.Civ.P. 23(c)(4)(B), of odd lot buyers for particular periods, and one subclass treated as a test case, with the other subclasses held in abeyance. Individual notice at what would probably be a reasonable cost could then be given to all members of the particular small subclass who can be easily identified. *See* Kaplan, *supra*, 81 Harv.L.Rev. at 390–91; Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L.Rev. 433, 438–54 (1960).

The problem of individualized notice under Rule 23(c)(2) is so important to the future of class actions and the panel's resolution of it seems so inconsistent with the spirit of Rule 23, in short, that consideration by the full court seems essential.

At least as questionable is the panel's conclusion that this class action is un

manageable and should be dismissed because "no notice by publication could be devised by the ingenuity of man that could reasonably be expected to notify more than a relatively small proportion of the class." Op. at 1017. The panel seems to intimate in a footnote that individualized notice to all 6,000,000 members of the class borders on being a constitutional requirement. Op. at 1017, n. 21. This intimation seems to me to be profoundly incorrect. In my view notice to class members who cannot be identified is not a constitutional requirement and not a prerequisite to a manageable class action. All that the due process clause requires is a procedure that "fairly insures the protection of the interests of absent parties who are to be bound by [the judgment]." Hansberry v. Lee, 311 U.S. 32, 42, 61 S.Ct. 115, 118, 85 L. Ed. 22 (1940) (not cited by panel decision). *See* Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313–314, 70 S.Ct. 652, 94 L.Ed. 865 (1950); Northern Natural Gas Co. v. Grounds, 292 F.Supp. 619, 636 (D.Kan.1960). *See also* C. Wright, *supra* at 313; Kaplan, *supra*, 81 Harv.L.Rev. at 391–92. *But cf. Eisen II*, 391 F.2d at 368–369. The Advisory Committee is a respectable body of procedural experts who did not consider individualized notice to all or a certain percentage of class members a prerequisite to the maintenance of a Rule 23 class action as a constitutional (or extraconstitutional) requirement. Advisory Committee Notes, 28 U.S.C.A., Rule 23 Supplementary Note at 302. The commentators generally agree. Assuming vigorous representation of the class's interests by the representative plaintiff (which is not in issue here), notice by publication to unidentifiable class members is constitutionally sufficient. Mullane v. Central Hanover Bank and Trust Co., *supra*, 339 U.S. at 314, 70 S.Ct. 652. A scheme of notice by publication (with costs perhaps taxed to the defendants) in financial journals of wide circulation —the Wall Street Journal, Business Week, Barron's, the New York Times financial section, and the like—would reach most of the class.

To say, as the panel opinion says, Op. at 1017, that "[w]here there are millions of dispersed and unidentifiable members of the class notices by publication . . . are a farce," and to say it without any supporting data or authority, strikes me as, in the words of the panel opinion, a "rhetorical device," Op. at 1013. In this day and age of communications, why are such notices a "farce"? It may be that most people will not heed them—the sums may be too small to bother with, for example—but does this make the notices farcical? Probate notices published in small-town newspapers around the country are treated as notice to the whole world of possible creditors and heirs that an estate is being closed, and they are pretty effective for this purpose. Notice by publication of actions such as this in key, spot places can be, I should think, highly effective. If notice in the "Drug Cases," State of West Virginia v. Charles Pfizer & Co., 314 F.Supp. 710 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied sub nom. Cotler Drugs, Inc. v. Charles Pfizer & Co., 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971), could work reasonably well, why can't it work with a somewhat more sophisticated group of consumers, odd lot buyers? Rule 23 was not looking toward perfect or total notification; it was—and I write of it in the past tense for this purpose—reaching out for a practical result that would permit numbers of little injured people to have their day, too, in court.

The panel opinion's suggestion, Op. at 1019, that it should "be possible for the Congress to create some public body to do justice in the matter of consumers' claims in such fashion as to afford compensation to the injured consumer" is in my view an abdication of judicial responsibility. It is as much as to say that the courts are insufficiently inventive to be capable of handling a matter—the distribution of unlawfully obtained money to a large number of people. I

doubt this very much. I suspect that the courts can do the job.

All in all, it seems to me that the panel's decision not merely ossifies, but destroys, the development of what was becoming an important procedural device for the airing of grievances where large numbers of people were affected and one individual did not have the resources to pursue his own legal rights to conclusion. At the very least the panel opinion should not be allowed to stand without full and complete consideration by the full active bench of this circuit, aided as we would be by the consultation and vote of the two distinguished senior judges who sat on the panel in question.

The Case Should Be Heard En Banc.

One can argue, as many wiser minds than the writer's have argued, that a court of appeals should never use the en banc procedure. The Learned Hand court was apparently able never to sit en banc. *See generally* M. Schick, Learned Hand's Court 105–06, 116–22 (1970). But this was before the number of judges on the court was expanded to meet the court's burgeoning business. In other words, it was when the court and its business were small enough to enable a good deal more consultation before adjudication among the judges on the court than now does or can occur. Never to use the en banc procedure would tend to fragment a court of 14 or 15 judges into panels of three, enabling a given panel—which sometimes consists of judges not appointed to the particular circuit court—to determine cases for the whole court. If panel decisions absent an en banc procedure were to be binding on the other members of the court (as with an en banc procedure this court has always treated them in the past), there would be (A) an even greater burden on the Supreme Court than it now has to correct egregious error or to examine important cases and (B) an individual active circuit court judge's vote would count, at least in the Second Circuit, in only the 160–220 cases per year on which he sits and be of no significance whatever in the remaining 1,000 ± cases [5] coming before the court.

In the event this court's tradition were to be broken and an individual panel's determination were *not* be be binding on the rest of the court, the Supreme Court's burden would be equally great and this court would be even more fragmented. Its decisions would merit only the support that the persuasiveness of the individual opinion writer or the prestige of the particular panel could muster. There would be no "law of the circuit" as such. The district judges and others who look to the Court of Appeals for guidance in their decision-making would find none.

Thus it seems to me that the en banc procedure, or some viable substitute for it, is essential to ensure cohesion, a degree of uniformity and the promotion of appellate justice, in the Court of Appeals. The en banc power has received the imprimatur of an 8–1 Supreme Court, in a case that is still law, as "a necessary and useful power—indeed too [sic] useful that we should ever permit a court to ignore the possibilities of its use in cases where it might be appropriate." Western Pacific Railroad Corp. v. Western Pacific Railroad Co., 345 U.S. 247, 260, 73 S.Ct. 656, 662, 97 L.Ed. 986 (1953). There are those of us, I suspect, who think the exercise of that power is one alternative preferable to the controversial national court of appeals which is receiving considerable attention these days.

The only viable alternative to the en banc procedure, if there is to be any genuine "court" position on a given case, is the prepublication circulation of all opinions for comment which is done in some circuits. This would be somewhat helpful but has the disadvantages of being advisory only, unless the en banc procedure is invoked; it also creates some

5. For fiscal year 1972, an unusually light year in this circuit, there were a total of 1,317 filings and 177 appeals terminated without decision. 1973's figures indicate that about 1,200 cases will come before the court.

work under the pressure of time deadlines additional to that which the en banc procedure permits. Prior circulation in seemingly important cases which is done in this circuit fairly frequently, with I think good result, but was not done in this particular case, has some merit, too; at least it may alert the whole court to an important case or the opinion writer or panel to some serious questions. Here even this alternative has been unavailable.

There Is No Good Reason for Not Hearing This Case En Banc.

There is no real pressure of time (the lapse of time since *Eisen II* is five years; the Supreme Court is unlikely to examine the inevitable petition for a writ of certiorari until four or five months from now),[6] that would, as to some extent it did in the Pentagon Papers case,[7] make en banc rehearing or opinion writing unfeasible. There is no reason why the Supreme Court should not have before it some view, even if it is not a majority one, from this court, different from the panel's if, as I think is undoubtedly the case, an en banc vote would result in such.

It is said or suggested that this case is so important that it will surely result in a grant of certiorari. With all respect I do not know how we can be so prescient about the United States Supreme Court. It may decide that it wants to hear from other circuits, and have a more balanced view before it than what is now the Second's, before it grants the all powerful writ. The Court may decide that it prefers to postpone the issue until another day, for reasons of internal administration or external policy.

I believe in short that our duty is to hear this case en banc. Since the panel opinion sounds the "death knell," see Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U. S. 1035, 87 S.Ct. 1487, 18 L.Ed.2d 598 (1967), for consumer and environmental class actions, the omission to do so is to my mind grievous. Perhaps, however, it will serve as a vehicle for a higher authority to tell us whether the admonitions of Western Pacific Railroad Corp. v. Western Pacific Railroad Co., *supra*, relative to the en banc procedure still have any meaning. If they do not, the world may not come to an end, but we will be an interesting court to watch as our eight active and six senior and numerous visiting and district judges go from decision to decision, guided 2 per cent[8] of the time by a grant of certiorari. We will at least be somewhat unpredictable, and this may create enough litigation on the chance that an individual panel may reverse that our calendar will become as unmanageable as the panel opinion felt the instant class action was.

6. We are told that the average en banc proceeding takes about 155 days. This is not really necessary in my view but in this case would not be too harmful.

7. United States v. New York Times Co., 444 F.2d 544 (2d Cir. 1971), rev'd, 403 U.S. 713, 91 S.Ct. 2270, 29 L.Ed.2d 853 (1971).

8. From information furnished by the Circuit Executive of our court, in fiscal year 1972 there were 369 petitions for certiorari from the Second Circuit filed and only 18 granted. In fiscal year 1973, 284 petitions have been filed and only 12 granted. If in forma pauperis petitions are included as cases heard by our court, the percentage of certiorari grants is closer to 1.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-2154

THE STATE OF NORTH CAROLINA,

Appellant,

versus

CHAS. PFIZER & CO., INC.,
AMERICAN CYANAMID COMPANY,
BRISTOL-MYERS COMPANY-
OLIN MATHIESON CHEMICAL CORPORATION
and THE UPJOHN COMPANY,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge.

Argued June 10, 1975 Decided Jan. 12, 1976

Before RUSSELL, FIELD and WIDENER, Circuit Judges.

Jean A. Benoy, Deputy Attorney General of North Carolina, (Rufus L. Edmisten, Attorney General of North Carolina, John M. Silverstein, Assistant Attorney General of North Carolina, Noel L. Allen and David S. Crump, Associate Attorneys General, North Carolina Department of Justice on brief) for Appellant; Robert E. Cooper, (John J. Geraghty, David W. Long, Julian O. von Kalinowski, Don J. Belcher, James R. Martin; Gibson, Dunn and Crutcher; Poyner, Geraghty, Hartsfield and Townsend on brief) for Appellee Chas. Pfizer and Co., Inc.; Merrell E. Clark, Jr. (Joseph C. Moore, Jr., Young, Moore and Henderson; Winthrop, Stimson, Putnam and Roberts; Fish and Neave on brief) for Appellee Bristol-Myers Company; Robert B. Owen, (Charles E.

Buffron, Joseph C. Moore, Jr., Joseph W. Yates III; Covington and Burling; Young. Moore and Henderson on brief) for Appellee The Upjohn Company; Allen F. Maulsby, (Joseph C. Moore, Richard M. Hrisch; Young Moore and Henderson; Cravath. Swaine and Moore on brief) for Appellee Olin Mathieson Chemical Corporation; Samuel W. Murphy, Jr., (Kenneth N. Hart, Richard Y. Holcomb, Howard E. Manning, Steven M. Hayes; Donovan, Leisure, Newton and Irvine; Manning, Fulton, and Skinner on brief) for Appellee American Cyanamid Company.

FIELD, Circuit Judge:

Alleging violations of sections 1 and 2 of the Sherman Act, the State of North Carolina instituted this action for damages on behalf of itself. its governmental subdivisions and all citizen consumers who had purchased broad-spectrum antibiotics manufactured and sold by the defendants in North Carolina during the period 1952 to 1966. The defendants are Chas. Pfizer & Co., Inc. (Pfizer), American Cyanamid Company (Cyanamid), Bristol-Myers (Bristol), Olin-Mathieson Chemical Corporation (Squibb), and The Upjohn Company (Upjohn).

The thrust of the plaintiff's case is that Pfizer, aided by Cyanamid, obtained the Conover patent[1] on the antibiotic, tetracycline, by conduct which amounted to a fraud on the Patent Office and thereafter, in combination with the other defendants, exploited it for the purposes

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1. Tetracycline was first identified by Dr. Conover, a Pfizer chemist, and an application for a patent on tecracycline and the production process was filed by Pfizer on behalf of Dr. Conover on October 23, 1952. The patent,carrying No. 2,699,054, is generally referred to as the Conover patent.

of restraining and monopolizing trade and commerce in the broad-spectrum antibiotic market and particularly the tetracycline market.[1a] The case was tried to the court without a jury, and after an extended trial the district judge filed an opinion containing his findings of fact and conclusions of law.[2] The court concluded that the plaintiff had failed to establish that the defendants had violated the Sherman Act, or that Pfizer was guilty of fraudulent procurement or misuse of the Conover patent. Accordingly, judgment was entered in favor of the defendants and North Carolina has appealed.

North Carolina's appeal presents two issues: (1) Whether the district court erred as a matter of law when it denied the plaintiff's motion for partial summary judgment on the basis of collateral estoppel that Pfizer and Cyanamid had caused the Conover patent to be issued by defrauding the United States Patent Office; and (2) whether the district court's findings of fact were clearly erroneous.

1a. See Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965)

2. State of North Carolina v. Chas. Pfizer & Co., Inc., 384 F.Supp. 265 (E.D. N.C. 1974).

The Conover patent has been involved, either directly or indirectly, in extensive litigation commencing with a proceeding before the Federal Trade Commission (Commission) in 1958, and the background of the present controversy has been chronicled in a number of decisions.[3] The relevant facts developed in the district court are as follows. Prior to 1952 three effective and patented broad-spectrum antibiotics were produced and marketed. They were Aureomycin which was produced by Cyanamid and was covered by the Duggar patent, U.S. Patent No. 2,482,055 and the Niedercorn patent, U.S. Patent No. 2,609,329; Terramycin

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3. The reported cases are as follows:

United States v. Chas. Pfizer & Co., Inc., et al, 245 F.Supp. 801 (S.D. N.Y. 1965).
American Cyanamid Co. v. F.T.C , 363 F.2d 757 (6 Cir. 1966).
Chas. Pfizer & Co., Inc. v. F.T.C., 401 F.2d 574 (6 Cir. 1968), cert. denied, 394 U.S. 920.
United States v. Chas. Pfizer & Co., Inc., 217 F.Supp. 199 (S.D. N.Y. 1963).
United States v. Chas. Pfizer & Co., 281 F.Supp. 837 (S.D. N.Y. 1968).
United States v. Chas. Pfizer & Co., 426 F.2d 32 (2 Cir. 1970), reh. den., 437 F.2d 957, cert. granted, 402 U.S. 942, aff'd, 404 U.S. 548.
United States v. Chas. Pfizer Co., Inc., 367 F.Supp. 91 (S.D. N.Y. 1973).

which was produced by Pfizer and was covered by the Sobin patent, U. S. Patent No. 2,516,080; and Chloromycetin which was patented and produced by Parke-Davis. Parke-Davis is not a party to the present litigation. None of these three manufacturers granted licenses or cross-licenses for these particular drugs. Each of the antibiotics are prescription drugs and their sales are largely dependent upon the physician's opinion of their effectiveness. Since they have a high degree of interchangeability, each manufacturer priced his drugs at a level competitive with the other two producers, thereby creating a stable and parallel price structure, and price reductions by one manufacturer were met by the others during these years.

Prior to 1952, neither the molecular structure of Terramycin nor that of Aureomycin was known, and Dr. Conover, a Pfizer scientist, was a member of a research team which was seeking to determine the structure of Pfizer's Terramycin. In the spring of 1952 the Pfizer team succeeded in ascertaining the structures of both Terramycin and Aureomycin. Shortly thereafter, Dr. Conover discovered that another antibiotic, tetracycline,

could be produced by the application of a deschlorination process to Aureomycin. Pfizer filed the Conover application for a product and process patent on tetracycline in October of 1952, and in March of 1953 Cyanamid filed its Boothe-Morton application for a similar patent. In addition to these two applications, in September of 1953 Heyden Chemical Corporation filed its Minieri application[4] for a patent on tetracycline and the fermentation process for producing it, and in October, 1953, Bristol filed a similar application under the name of Heinemann.

The competing claims of Pfizer and Cyanamid resulted in the declaration of an interference by Herbert J. Lidoff, the Patent Examiner, in December of 1953. While Pfizer believed that it possessed priority of invention, it was aware that its sole method of tetracycline production

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4. Shortly after the filing of the Minieri application, Heyden negotiated the sale of its Antibiotic Division to Cyanamid and on December 1, 1953, Cyanamid took over the assets of Heyden's Antibiotic Division, including the Minieri patent application. Thereafter, Cyanamid abandoned the product claims of the Minieri application but continued to prosecute the process claims. A patent on the Minieri process claim was issued to Cyanamid in February, 1956.

depended upon the application of the deschlorination process to Cyanamid's patented Aureomycin thereby making it wholly dependent upon Cyanamid for its supply of bulk Aureomycin. In an attempt to resolve the question, representatives of the two companies worked out an agreement providing (1) that the parties would exchange proof of priority and that the prevailing party would grant a non-exclusive license to the other in consideration of a fixed royalty; (2) that Cyanamid would grant Pfizer a non-exclusive license to produce Aureomycin for use in tetracycline production; and (3) that Cyanamid would sell to Pfizer an initial quantity of bulk tetracycline so that Pfizer might immediately enter the tetracycline market. After an exchange of proofs relative to the discovery Cyanamid conceded priority to Pfizer and, upon this concession, the Patent Office terminated the interference.

In the meantime, Bristol continued the prosecution of its Heinemann application, and in March of 1954 the Examiner declared a second interference between the Heinemann, Conover and Cyanamid's Minieri applications. The interference proceeding continued until October 14,

1954, on which date the Examiner dissolved the interference, primarily on the ground that tetracycline was unpatentable over the prior art as disclosed in Cyanamid's Duggar and Niedercorn patents because tetracycline, as well as Aureomycin, appeared to be co-produced in fermentation processes disclosed by those two prior patents. Thereafter, in November of 1954 the Examiner issued rejections on all of the claims in the Conover, Minieri and Heinemann applications. Following this dissolution of the second interference Pfizer continued the ex parte prosecution of the Conover application and endeavored to convince Examiner Lidoff that he was in error. Subsequently, Lidoff requested Pfizer to run tests on "Example 28" which was one of the forty-four samples of media contained in the Niedercorn patent. Pfizer conducted the tests to determine whether tetracycline could be recovered from "Example 28" using the recovery procedures described in the Bogert-Walsh,[5] Minieri and Heinemann applications.

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5. The Bogert-Walsh application was filed by Pfizer in April of 1954 and dealt with the separation of tetracycline from chlortetracycline in fermentation broths and other aqueous solutions.

Based upon these tests Pfizer submitted affidavits to the Examiner, reporting that efforts to recover products clearly identifiable as tetracycline from the "Example 28" fermentation broths were unsuccessful. Following the submission of further information by Pfizer, Examiner Lidoff withdrew his previous rejection and allowed the Conover application. The patent on tetracycline and the deschlorination process was issued to Pfizer on January 11, 1955.

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As heretofore stated, the controversy relative to the procurement and use of the Conover patent by Pfizer first surfaced in a proceeding before the Federal Trade Commission in 1958, charging the five defendants in the present case with violations of Section 5 of the Federal

Trade Commission Act, 15 U.S.C. § 45.[6] The Commission's complaint alleged, among other things, that Pfizer had made false and misleading statements to the Patent Office for the purpose of inducing the issuance of the Conover patent, and that Cyanamid and Bristol had withheld material information from the Patent Office in the course of the prosecution of their patent applications. It further charged that Pfizer, Cyanamid, Bristol, Squibb and Upjohn had violated the Act by maintaining arbitrary prices through a conspiracy and combination, and by restraining and eliminating competition in the sale of antibiotics. The Hearing Examiner initially found in favor of the drug companies on all issues and dismissed the complaint. However, the Commission reversed the Hearing Examiner and determined that Pfizer and Cyanamid were guilty of a fraud

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6. 15 U.S.C. § 45 (a)(1): "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

15 U.S.C. § 45 (a)(6): "The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

on the Patent Office and that they, together with Bristol, Squibb and Upjohn, were guilty of price fixing. The Commission issued a cease and desist order with respect to price fixing and, additionally, directed Pfizer to license its tetracycline patent to any domestic applicant on a two and one-half per cent royalty basis. Under identical terms Cyanamid was directed to license its two Aureomycin patents.

The respondent companies filed a petition for review in the Court of Appeals of the Sixth Circuit.[7] After a review of the proceedings in the Patent Office incident to the prosecution of the Conover application, the court stated that "[f]undamental to the Commission's findings of improper conduct on the part of Pfizer and Cyanamid is the question as to what extent previous coproduction of tetracycline in Aureomycin broths was material to the issuance of the patent."[8] The court noted that this involved numerous questions concerning the actions and purposes of Examiner Lidoff as representative of the Patent Office,

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7. American Cyanamid Company v. F.T.C., 363 F.2d 757 (6 Cir. 1966).

8. Id., at 777.

and concluded that in the absence of his testimony the decision of the Commission on this issue was necessarily based upon inferences and speculation insufficient to constitute substantial evidence. Accordingly, the entire proceeding was remanded to the Commission for a de novo hearing, with directions that the Commission could consider any evidence previously taken as well as any additional evidence relevant to the issues.

Upon the remand, the proceeding was assigned to a new Hearing Examiner and the testimony of Examiner Lidoff and two witnesses for Pfizer was taken. The Hearing Examiner found that representatives of both Pfizer and Cyanamid had made false and misleading statements to the Patent Office which induced the issuance of the Conover patent, and that such conduct constituted an unfair method of competition within the meaning of the Federal Trade Commission Act. The Commission adopted the findings and conclusions of the Hearing Examiner relative to the patent issue, but dismissed the charge of price fixing by an equally divided vote. The Commission's order again required Pfizer and Cyanamid to grant non-discriminatory

licenses under their patents for tetracycline and Aureomycin.

Upon petition for review the Sixth Circuit held that the Commission's findings were supported by substantial evidence and affirmed and enforced its order.[9] The court noted the sharp disagreement between Pfizer's witnesses and Examiner Lidoff with respect to the tests which had been conducted by Pfizer on Niedercorn "Example 28". Pfizer took the position before the Commission (as it did in the present litigation) that Lidoff was interested only in "appreciable" and "recoverable" amounts of tetracycline, but Lidoff testified that he did not consider either the proportion or the amount to be the significant factor. Pfizer further contended that if Lidoff was interested in mere trace amounts, he failed to convey that fact to Pfizer's representatives and, accordingly, they were not guilty of any misrepresentation. The court held, however, that there was substantial evidence to support the conclusion of the Commission that the Patent Office records were sufficient to put both Cyanamid and Pfizer

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9. Charles Pfizer & Co. v. F.T.C., 401 F.2d 574 (6 Cir. 1968).

on notice that Lidoff was interested in ascertaining whether any tetracycline was inherently produced in the Aureomycin broths.[10]

The complaint in the present case was filed in January of 1969, and thereafter the parties engaged in extensive discovery proceedings which focused primarily on the patent aspect of the litigation. In July of 1973, shortly prior to trial, the plaintiff filed a motion for partial summary judgment against Pfizer and Cyanamid on the issue that the Conover patent had been granted as a result of the false and misleading statements which had been made to Patent Examiner Lidoff. The basis for the motion was that this precise factual issue had been previously adjudicated by the Federal Trade Commission in the proceedings hereinabove set forth, and that Pfizer and Cyanamid should be collaterally estopped from relitigating the issue in the present case. In pressing its motion, the plaintiff contended that Blonder-Tongue v.

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10. The review statute, 15 U.S.C. § 45(e), provides:

> "The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."

University Foundation, 402 U.S. 313 (1971), had discarded the doctrine of mutuality of estoppel, and that under Zdanok v. Glidden Co., 327 F.2d 944 (2 Cir. 1964), and United States v. United Airlines, Inc., 216 F.Supp. 709 (E.D. Wash. & Nev. 1962), aff'd as to res judicata, sub nom. United Airlines v. Wiener, 335 F.2d 379 (9 Cir. 1964), it was entitled to use the Commission's decision offensively against Pfizer and Cyanamid. The district court, in denying the motion, rejected plaintiff's argument that the doctrine of collateral estoppel as recognized in Blonder-Tongue should be extended to cover its use offensively by an antitrust plaintiff against a patentee.

The question before the Court in Blonder-Tongue was whether the doctrine of mutuality of estoppel which it had applied in Triplett v. Lowell, 297 U.S. 638 (1936), was "a viable rule where a patentee seeks to relitigate the validity of a patent once a federal court has declared it to be invalid."[11] Upon the narrow issue before it the Court concluded "that Triplett should be overruled

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11. 402 U.S. 313, at 327.

to the extent it foreclosed a plea of estoppel by one facing a charge of infringement of a patent that has once been declared invalid."[12] Since the validity vel non of the Conover patent was not directly in issue in the proceedings before the Commission[13] or in the court below, the precise holding of Blonder-Tongue is not dispositive of the question raised by the plaintiff's motion. This is of little moment, however, since the plaintiff's motion should properly be considered in the light of the fundamental change and development of the doctrine of collateral estoppel in the courts which was thoroughly reviewed and analyzed by Mr. Justice White in his opinion in Blonder-Tongue.

The landmark case is, of course, Bernard v. Bank of America Nat. Trust & Savings Assn., 19 Cal.2d 807,

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12. Id., at 350.

13. "The Commission did not undertake to pass upon the validity of the patent nor do we. The order of the Commission treats the patent as valid and requires compulsory licensing. The issue here is a violation of section 5 of the Federal Trade Commission Act, not the validity of a patent." Chas. Pfizer & Co. v. F.T.C., 401 F.2d 574, 586 (6 Cir. 1968).

122 P.2d 892 (1942), in which Justice Traynor rejected the doctrine of mutuality and stated the criteria as follows:

> "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"
> 19 Cal. 2d, at 813, 122 P.2d, at 895.

In the wake of Bernard, the great majority of the courts, both state and federal, elected to jettison the mutuality requirement, especially where the prior judgment was invoked defensively. This abrogation of mutuality engendered what Mr. Justice White characterized as "mutations in estoppel doctrine" which have resulted in a much more flexible application of this once narrow and restricted concept. Typical of this more liberal approach is Eisel v. Columbia Packing Company, 181 F.Supp. 298, 301 (D. Mass. 1960), where Judge Wyzanski stated:

> "where a plea of collateral estoppel is raised against a plaintiff who had a full trial in a prior action, the decisive question is not whether there is mutuality of estoppel. Nor is the decisive question whether there is technical privity between the second defendant and the first defend-

> ant. Instead of such wooden tests, inquiries should be made as to whether plaintiff had a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time."

This rationale was adopted in our own circuit in Graves v. Associated Transport, Inc., 344 F.2d 894, 900 (1965):

> "The courts * * * have willingly inquired into the circumstances of the actual case, and time and again they have allowed the plea against a party not having the initiative in the former action whenever they have been satisfied that the party against whom the former judgment was invoked in fact had a realistically full and fair opportunity to litigate the issues in the former action."

Appraised in the light of Eisel and Graves, however, we think the plaintiff's motion was properly denied since, in our opinion, the proceeding before the Commission did not afford Pfizer and Cyanamid a "fair opportunity procedurally, substantively and evidentially" to litigate the issue raised in the present case. First of all, the case before the Commission was an administrative proceeding, not a judicial trial, and while the Sixth Circuit put its imprimatur upon the Commission's determination, the court, acting under the review statute, merely found that there was substantial evidence to support the Com-

mission's conclusions. The issue before the Commission was whether the respondents in that proceeding were guilty of unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act which is a regulatory statute much broader in its scope than the Clayton and Sherman Acts under which the present litigation was instituted. The Commission did not require that the alleged fraud on the Patent Office be demonstrated by clear and convincing evidence[14] and employed evidentiary and procedural rules much more lenient than those incident to a judicial trial. While we are not disposed to hold that an administrative proceeding can never be the basis for a plea of collateral estoppel, we do not think it would be appropriate to accord such effect to the Commission's Section 5 proceeding in the present case.[15]

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14. The parties concede that the "clear and convincing" standard applies to this issue. See Schnadig Corporation v. Gaines Manufacturing Co., Inc., 494 F.2d 383, 393 (6 Cir. 1974).

15. In support of its contention that the administrative proceeding is entitled to collateral estoppel effect, the plaintiff cites United States v. Willard Tablet Co., 141 F.2d 141 (7 Cir. 1944), and United States v. Piuma, 40 F.Supp. 119 (S.D. Cal. 1941). These cases are inapposite since they were merely statutory proceedings in each of which the court simply applied the provisions of 45 U.S.C. 45(g) governing the finality of the Commission's orders.

We agree with the observation of the court in United States v. Chas. Pfizer & Co., 205 F.Supp 94, 96 (S.D. N.Y. 1962):

> "The legal concepts and issues are quite different. The Federal Trade Commission is regulatory in nature; the Sherman Act is penal as well as civil; the consequences flowing from each Act are quite dissimilar. The proceedings themselves, the rules governing them and the legal principles applicable to each are distinct."

Our conclusion on this point is buttressed by the fact that by the very terms of the Federal Trade Commission Act, proceedings under Section 5 appear to be incompatible with the doctrine of collateral estoppel. Section 5(e)[16] of the Act reads:

> "No order of the Commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation, from any liability under the antitrust acts."

It would be strangely unfair to permit the Government to litigate under the Sherman or Clayton Acts an issue earlier decided against it in a Section 5 proceeding, and at the same time deny to a respondent the right to defend on the same issues in a subsequent antitrust suit brought

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16. 15 U.S.C. § 45(e).

by a plaintiff who was not even a party to the administrative proceeding. We further note that Section 5(a) of the Clayton Act[17] provides, in effect, that a final judgment or decree rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated such laws shall be prima facie evidence against the defendant in any action or proceeding brought by any other party or the United States as to all matters respecting which such judgment or decree would be an estoppel as between the parties thereto. To us it would be paradoxical to accord a Section 5 administrative proceeding the absolute effect of collateral estoppel when a court determination in a criminal action that a defendant had violated the Sherman Act is limited to only prima facie effect. Accordingly, we conclude that the district court acted properly in denying the plaintiff's summary motion.

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17. 15 U.S.C. § 16(a).

- II -

In addition to the collateral estoppel issue the plaintiff urges that the findings of the trial court on the operative issues in this case were clearly erroneous and should be set aside. We are persuaded otherwise.

On the charge of fraud all of the parties focus upon the deposition of the Patent Examiner, Lidoff, and they are in agreement that his testimony was crucial on this point.[18] Lidoff testified that if he had known that tetracycline was inherently co-produced along with Aureomycin in the practice of the Duggar and Niedercorn patents he would have rejected the Conover application. However, he candidly admitted that he could not recall what was actually said in the various

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18. Although the district court overruled the defendants' objection to the admissibility of Lidoff's testimony, it recognized that there was a serious question on this point. See United States v. Morgan, 313 U.S. 409 (1941); W.R. Grace & Co. v. Park Manufacturing Company, 378 F.Supp. 976 (E.D.Ill. 1974); cf. American Cyanamid Company v. F.T.C., 363 F.2d 757, 779 (6 Cir. 1966).

interviews incident to the Conover application, and stated the basis of his testimony as follows:

> "[A]nything that I say as having recalled something is really a reconstruction in my mind based on what recent review of the record I have had, which has not been in any detail. So that I cannot say that I positively recall one thing or another. But I can reconstruct what my view would have been at that time."

Upon this basis Lidoff adhered to his position that he considered the presence of any tetracycline in the experimental broths to be significant on the question of patentability. This, of course, was at variance with Pfizer's contention that Lidoff was interested only in the presence of appreciable and recoverable amounts of tetracycline.

Upon this conflict the district court found the record supportive of Pfizer's position. Among other things, an amendment filed in the Patent Office on November 29, 1954, following a meeting with Lidoff stated: "He [Lidoff] * * * is not concerned about trace amounts which can be separated from the broths by methods now recommended for recovery of the new antibiotic." The district court further noted that the

presence of some tetracycline in Aureomycin broths was known by scientists at the time the Conover patent was being processed, and was disclosed by documents in patent applications which were then pending before Examiner Lidoff, including a certificate filed by Pfizer's Dr. Bogert. In considering the probative force of Lidoff's testimony, the court also had before it the testimony of four patent experts and several patent attorneys to the effect that prior accidental and unrecognized co-production of trace amounts of tetracycline with Aureomycin would not render Pfizer's claim to tetracycline unpatentable. This testimony supported Pfizer's contention that neither its patent counsel nor Lidoff considered trace amounts of tetracycline significant. Based upon a careful review of the evidence bearing on this issue, the district judge concluded that the plaintiff had failed to establish its charge of fraud on the Patent Office, stating that, at best, it disclosed only a misunderstanding between Pfizer's representatives and Lidoff.

On the charge that the defendants had engaged in a conspiracy to exclude competition and monopolize

the tetracycline market, the plaintiff placed considerable reliance upon the settlement of the patent interference between Pfizer and Cyanamid. The district court's rejection of the plaintiff's contention that this was convincing evidence of conspiratorial conduct is supported by Judge Dobie's observation in Hutzler Bros. Co. v. Sales Affiliates, Inc., 164 F.2d 260 (4 Cir. 1947):

> "We cannot attach, as defendants seem to suggest, any ulterior motives, or any improper conduct, to plaintiffs in connection with the agreed settlement with Bohemen in the interference proceedings. Had the interference proceedings been prosecuted to final judgment, this would have unquestionably delayed the granting of the patent in suit."
> 164 F.2d, at 267.

On these issues, as well as the charge of price fixing, the district court found that the actions of the defendants were consistent with the lawful exercise of sound business judgment. The court's review of the pricing policies of the defendants and other drug manufacturers, as well as the trend of market prices during the years in question support its findings on these issues. "The antitrust laws were not meant to

prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or similar policy."[19]

Upon this appeal "[i]t is not enough that we might give the facts another construction, resolve the ambiguities differently and find a more sinister cast to actions which the district court apparently deemed innocent. * * * We are not given those choices because our mandate is not to set aside findings of fact 'unless clearly erroneous'." United States v. Real Estate Boards, 339 U.S. 485, 495 (1950). Since we conclude that the findings of the district judge were not clearly erroneous, the judgment below is affirmed.

A F F I R M E D.

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19. Independent Iron Works, Inc., v. United States Steel Corp., 177 F.Supp. 743, 747 (N.D. Cal. 1959), aff'd 322 F.2d 656 (9 Cir. 1963), cert. denied, 375 U.S. 922 (1963).

[¶ 74,986] City of Detroit, et al. v. Grinnell Corp., American District Telegraph Co., Holmes Electric Protective Co., Automatic Fire Alarm Co. of Delaware; Manhattan-Ward, Inc., et al. v. Grinnell Corp., American District Telegraph Co., Holmes Electric Protective Co., Automatic Fire Alarm Co. of Delaware; 1225 Vine Street Building, Inc., et al. v. Grinnell Corp., American District Telegraph Co., Holmes Electric Protective Co., Automatic Fire Alarm Co. of Delaware.

U. S. Court of Appeals, Second Circuit. Nos. 14, 18; September Term, 1973. Docket Nos. 73-1221, 73-1420. Decided March 13, 1974.

Appeal from U. S. District Court, Southern District of New York, Charles M. Metzner, Judge: (1) approving the proposed settlement reached by defendants and the attorney for the class representatives; (2) awarding counsel fees to the attorney for the class representatives; and (3) acknowledging the standing of certain other attorneys who seek a portion of the fee award.

Affirmed as to approval of the $10 million settlement; reversed as to the fee award and remanded for a hearing to develop the facts in accordance with this opinion; and dismissed for lack of appellate jurisdiction as to the standing of other attorneys seeking a portion of the fee award.

Sherman Act

Private Suits—Damages—Class Settlement—Amount of Settlement v. Potential Recovery—Strength of Plaintiffs' Case.—A $10 million settlement of three national class

actions in the "central station protection service" litigation was not inadequate as a matter of law, even if the settlement amounted to only a fraction of the potential recovery. If the settlement was grossly inadequate, it could have been so only in light of the strength of the plaintiffs' case. When so viewed, the defendants' liability was not *prima facie* established by the government's related monopoly case, since it was based largely on the defendants' predatory price cutting practices, rather than on overcharges to customers. Furthermore, there was a serious question as to whether the suits could have been maintained as class actions. See ¶ 9302.81.

Private Suits—Damages—Class Settlement—Computation of Potential Recovery—Trebling—Settlement Period.—In approving a $10 million settlement of three national class actions in the "central station protection service" litigation, the court properly estimated the potential recovery of the plaintiffs. Rejected was plaintiffs' contention that the settlement amounted to only 12 percent of potential recovery, since their figure was based upon the unwarranted assumption that potential recovery consists of treble damages. Also properly excluded from the base recovery figure were legal expenses, since they too, as treble damages, require a judgment. Furthermore, the period of time for which damages were recoverable was correctly determined. The plaintiffs failed to sustain their burden of proof that fraudulent concealment persisted after a period of "tacit conspiracy" ended. See ¶ 9302.81.

Private Suits—Damages—Class Settlement—Sufficiency of Hearing.—The court approving a $10 million settlement of three national class actions in the "central station protection service" litigation had sufficient facts before it so that no additional evidentiary hearing was necessary. Plaintiffs' assertions that the court had not considered sufficient economic data because plaintiffs were unable to make additional discovery demands were rejected. See ¶ 9032.

Private Suits—Damages—Class Settlements—Lack of Formal Class Determination.—The court approving a $10 million settlement of three national class actions in the "central station protection service" litigation did not act improperly in assuming the existence of viable classes for purposes of the settlement. The major concern of the Manual For Complex Litigation's recommendation against conditional approval of a class—that a defendant might be able to play one would-be representative off against the other—was not present in the case. Furthermore, to whatever minimal extent the court may have violated the provisions of the Manual, it did so by applying the law of the Circuit. See ¶ 9032.

Private Suits—Damages—Class Settlement—Defendants' Ability to Pay a Larger Amount—Burden on Judicial System.—It was not improper for the court approving a $10 million settlement of three national class actions in the "central station protection service" litigation to consider the financial ability of some of the defendants to pay a larger settlement. Although the court did not specifically find that the two larger defendants could not bear more than their portion of the settlement, they too had their financial limits, especially since other suits had been settled and cases remained to be defended. Furthermore, an assertion that the burden on the judicial system of having a trial on individual suits was not a proper factor to consider in approving a class settlement was rejected. See ¶ 9302.81.

Private Suits—Class Action Settlement—Attorney's Fees—Evidentiary Hearing.—A court improperly approved attorney's fees of $1,500,000 for counsel representing three national classes settling for $10 million in the "central station protection service" litigation, since no evidentiary hearing was held. There were factual voids and disputed claims which made such a hearing necessary. Furthermore, the question of whether the district court should consider the applications of other attorneys to share in whatever fee was awarded was not yet ripe for review, since the lower court's recognition of the attorneys' standing and call for a hearing did not amount to a final judgment. See ¶ 9320.95.

Affirming in part and reversing in part 1973-1 Trade Cases ¶ 74,341.

For appellants: Harvey S. Kronfeld, Philadelphia, Pa. (Mesirov, Gelman, Jaffe & Levin and Anthony E. Creato, of counsel), for Aldon Industries, Inc. and 19 other

and G. Joseph King, of counsel), for Bay Fair Shopping Center, et al., claimants. **For appellees:** David Berger, Philadelphia, Pa. (David Berger, P. A. and H. Laddie Montague, Jr., of counsel), for City of Detroit, Manhattan-Ward, Inc., 1225 Vine Street Building, Inc., class representatives; Gordon B. Spivak, New York, N. Y. (Lord, Day & Lord, Herbert Brownell, Thomas D. Brislen, David Berger, P. A., Philadelphia, Pa., David Berger, and H. Laddie Montague, Jr., of counsel), for David Berger and David Berger, P. A., counsel for class representatives; Denis McInerney, New York, N. Y. (Cahill, Gordon & Reindel, Thomas Currin, and Allen S. Joslyn, of counsel), for Grinnell Corp.; (White & Case, MacDonald Flinn, Thomas McGainney, Mario Diaz-Cruz III, New York, N. Y., of counsel), for American District Telegraph Co.; (Kelley, Drye, Warren, Clark, Carr & Ellis and Bud G. Holman, New York, N. Y., of counsel), for Holmes Electric Protective Co.; (Olwine, Connelly, Chase, O'Donnell & Weyher, William F. Sondericker, and Joseph M. Burke, New York, N. Y., of counsel), for Automatic Fire Alarm Co.; Barry Brett, New York, N. Y. (Parker, Chapin & Flattau, Alvin M. Stein, Weil, Gotshal & Manges, A. Paul Victor, Freda F. Bein, Liebman, Eulau, Robinson & Perlman, Herbert Robinson, New York, N. Y., of counsel), for *pro se.*

Before: MOORE and HAYS, Circuit Judges; BRYAN, District Judge.*

MOORE, Cir. J.: This is an appeal from the District Court's approval of a proposed settlement, pursuant to Rule 23 of the Federal Rules of Civil Procedure, of three consolidated private antitrust national class actions brought in October, 1968, by commercial, industrial and governmental subscribers of "central station protection services" against four defendant corporations to recover treble damages plus attorneys' fees and costs under Section 4 of the Clayton Act. 15 U. S. C. § 15 (1970). The approved settlement, filed on December 27, 1972, calls for payment by the four defendants of $10 million to the three classes of plaintiffs and, in addition, grants a fee award of $1.5 million to counsel for the class representatives. The District Court retained jurisdiction over the case for the purposes of determining whether four other petitioning firms were entitled to share in this fee. The first group of appellants, consisting of members of the represented classes, attacks the settlement on the ground that it is so small as to be grossly unfair on its face. They also object to the manner in which the District Court approved the settlement. A second group of appellants, also members of the represented classes, seeks to overturn the fee award and to prohibit any outside attorneys from sharing in whatever award might ultimately be made.

Although all considerations point to the fact that the $10 million dollar settlement is fair and equitable, those same considerations do not justify such a large counsel fee award. Consequently, we affirm the District Court's approval of the settlement and reverse and remand for a hearing as to the fee award. We do not yet have the jurisdiction necessary to decide whether anyone other than counsel for the class representatives ought to share in any fee which might ultimately be awarded.

The Facts

Defendants American District Telegraph Company (ADT), Grinnell Corporation (Grinnell), Holmes Electric Protective Company (Holmes) and Automatic Fire Alarm Company (AFA) are in the business of providing "central station protection services" against the hazards of loss by burglary or fire. Alarm systems are installed on the premises of their customers, and protection services are furnished under subscriber contracts. "Central stations" are maintained in various cities throughout the country where the alarm devices on the protected premises are monitored.

The class actions in issue developed out of a civil injunctive action brought by the United States against the defendants. On November 27, 1964, Judge Wyzanski filed an opinion finding violations of Sections 1 and 2 of the Sherman Act. *United States v. Grinnell Corporation* [1964 TRADE CASES ¶ 71,298], 236 F. Supp. 244 (D. R. I. 1964). On June 13, 1966, the Supreme Court, in a six-to-three decision, affirmed the District Court in part, reversed in part, and remanded for further hearings on relief. *United States v. Grinnell Corporation* [1966 TRADE CASES ¶ 71,789], 384 U. S. 563 (1966). After more than a year of extensive further documentation, depositions, negotiations and hearings, Judge Wyzanski entered a final decree on July 11, 1967. Aside from awarding generalized injunctive relief, in-

* Of the Southern District of New York, sitting by designation.

cluding a prohibition against predatory pricing "at unreasonably low charges," the final decree directed varying amounts of divestiture of the assets by American District Telegraph Company in twenty-one of the one hundred and fifteen cities served by ADT, and directed other relief relating to the offering of contracts by ADT to competitors in five cities.

Thereafter two treble damage actions were brought in the United States District Court for the Eastern District of Pennsylvania by *competitors* of the defendants, *Robinson Electric Protective Corporation v. Grinnell Corporation*, Civ. No. 27961 and *Sentinel Alarm Corporation v. Grinnell Corporation*, Civ. No. 36061. The theory of these cases was that the defendants, beginning in 1958, had attempted to drive them out of business by predatory pricing. After extensive discovery covering pricing practices, the defendants settled the cases prior to trial. A series of suits instituted by both competitors and subscribers of the alarm company defendants followed. Suits were filed by over forty-eight competitors alleging predatory pricing practices in over thirty cities throughout the United States. In addition to the three national class actions *sub judice*, over fifty-four other individual subscriber actions were filed by other counsel.

In July, 1968, these three national class actions were commenced in the United States District Court for the Eastern District of Pennsylvania for all governmental, commercial and industrial subscribers of the defendants. The breadth of these classes is such that the only subscribers not covered are homeowners, federal governmental agencies, and governmental entities in three states[1] which are represented in separate statewide class actions.

On October 3, 1968, the national class actions, along with all but one other pending competitor case, were transferred, pursuant to 28 U. S. C. § 1407, to the United States District Court for the Southern District of New York for consolidation and coordination for pre-trial purposes.

At the time this settlement agreement was executed, on August 27, 1971, the national class actions had been pending for more than three years. Discovery by interrogatories and requests for production of documents had been substantially completed. All preliminary motions were filed, briefed, argued and resolved by judicial decision. As a result of the ruling on defendants' partial summary judgment motion, *sub nom. Russ Togs, Inc. v. Grinnell Corporation* [1969 TRADE CASES ¶ 72,931], 304 F. Supp. 279 (S. D. N. Y. 1969), *aff'd* 426 F. 2d 850 (2d Cir.), cert. denied, 400 U. S. 878 (1970), the three national class actions were held to have been timely filed. However, the rulings clearly established that with respect to any unfiled cases, the statute of limitations expired in September, 1968. A determination of the validity of the class action device, earlier stayed until defendants' motion for partial summary judgment had been adjudicated, was briefed and supported by affidavits and a hearing was held before the District Court on June 18, 1971. It was after the class action hearing that settlement negotiations between class counsel and counsel for defendants became serious. As a result, the District Court was asked to withhold any class action determination until after the settlement negotiations had been exhausted. Thereafter, settlement negotiations resulted in the settlement agreement dated August 27, 1971.

The Settlement Agreement on behalf of these three national class actions provided for the creation of a settlement fund in the amount of $10 million payable to the classes over a five year period, with interest. The period for includable transactions on which the allocation of the settlement fund is based is the period from April 13, 1957 (four years prior to the institution of the government case) to July 11, 1968 (the day after the actions were filed and one year after entry of the final decree in the government case). Notice was mailed at defendants' expense to 89,000 of their known customers and was also published for three consecutive weeks in all editions of the *Wall Street Journal* and the *New York Times*. Fourteen thousand one hundred fifty-six claimants filed claims. One hundred eighty-four attorneys and firms filed notices of appearance on behalf of the claimants and were served with defendants' papers in support of the settlement. A number of the plaintiffs in the individual subscriber nonclass actions decided to participate in the settlement as well.

After receiving documents from counsel for class representatives and counsel for defendants in support of the proposed settlement, and all claimants having an opportunity to file objections and papers in

[1] Connecticut, Maryland and New Jersey.

support thereof, the District Court held hearings on May 24 and 25, 1972, so that it might rule on the propriety of the settlement agreement, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and might award fair and adequate attorneys' fees to those who had represented the interests of the classes. On December 27, 1972, the District Court approved the settlement agreement and awarded, out of the settlement fund, $1.5 million plus $14,918.73 out-of-pocket expenses, to counsel for the class representatives, David Berger, Esq. and David Berger, P. A. The Court determined that further hearings would be necessary before it could decide whether other attorneys should share in the fee award.

Under the proposed settlement and the final judgment approving it, the treble damage claims of the classes are dismissed with prejudice.

The Settlement

These appellants, members of the classes which received the $10 million settlement, claim both that the settlement was inequitable on its face and that many of the principles applied by the District Court in approving the settlement were erroneous and mandate reversal. Appellants make four specific contentions. First, they allege that the settlement fund amounts to such a small fraction of the amount which might have been recovered if complete victory had been attained at trial that the law demanded its rejection by the District Court. Second, appellants submit that the District Court committed reversible error when it refused to permit an evidentiary hearing to investigate the propriety of the settlement. Third, they argue that it was error for the District Court to approve of the class action solely for the purpose of settlement while reserving approval of the class action for all other purposes. Finally, appellants urge that the District Court was persuaded in its decision to approve the settlement by considerations, such as the impecuniousness of the defendants and the inconvenience that might be visited upon the Court in the event that the settlement was rejected, which were both irrelevant to the legal issues and improperly entertained. We find no merit in any of these positions.

As we evaluate the settlement approved in this case, this Court must remain mindful that:

> Great weight is accorded to his [the trial judge's] views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.

Ace Heating & Plumbing Co., Inc. v. Crane Company [1971 TRADE CASES ¶ 73,762], 453 F. 2d 30, 34 (3d Cir. 1971).

In fact, so much respect is accorded the opinion of the trial court in these matters that this Court will intervene in a judicially approved settlement of a class action only when the objectors to that settlement have made a clear showing that the District Court has abused its discretion. *Newman v. Stein*, 464 F. 2d 689 (2d Cir. 1972); *West Virginia v. Chas. Pfizer & Co.* [1970 TRADE CASES ¶ 73,240], 314 F. Supp. 710 (S. D. N. Y. 1970), 440 F. 2d 1079 [1971 TRADE CASES ¶ 73,540], (2d Cir.), cert. denied sub nom., *Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U. S. 871 (1971).

I.

[*Amount of Settlement*]

The first claim set forth by appellants is that the $10 million settlement was inadequate as a matter of law. They allege that the settlement amounts, at most, to only twelve percent of what the District Court found was the potential recovery for the settlement period and that such a proposed settlement is grossly unfair on its face when liability has been *prima facie* established.

The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.[2]

The proposed settlement cannot be judged without reference to the strength of plaintiffs' claims. "The most important factor is the strength of the case for plaintiffs on the

[2] In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery. Any reading of Judge Friendly's opinion in *Newman v. Stein*, 464 F. 2d 689 (2d Cir. 1972), or of the District Court's opinion in *Percodni v. Riker-Maxson Corporation*, 50 F. R. D. 473 (S. D. N. Y. 1970), *aff'd sub nom., Farber v. Riker-Maxson Corporation*, 442 F. 2d 457 (2d Cir. 1971), which seems inconsistent with this principle misreads those opinions.

It might be pointed out that the settlement agreement approved in *Sunrise Toyota v. Toyota Motor Company, Ltd.*, 1973-1 TRADE CASES ¶ 74,398, at 93,821 (S. D. N. Y. 1973), did not provide for the payment of any money to the class members.

merits, balanced against the amount offered in settlement." *West Virginia v. Chas. Pfizer & Co., supra,* 440 F. 2d at 1085. See also *Protective Committee v. Anderson,* 390 U. S. 414 (1968); *Newman v. Stein, supra; Upson v. Otis,* 155 F. 2d 606 (2d Cir. 1946); *Percodani v. Riker-Maxson Corporation, supra* note 2; *Norman v. McKee,* 290 F. Supp. 29 (N. D. Cal. 1968), aff'd 431 F. 2d 769 (9th Cir. 1970). If the settlement offer was grossly inadequate, as appellants contend, it can be inadequate only in light of the strength of the case presented by the plaintiffs. Naturally, they describe their offensive posture in glowing terms, sparing no superlatives, while the defendants show a similar lack of restraint in demeaning the value of plaintiffs' cause of action. Nevertheless, the only truly objective measurement of the strength of plaintiffs' case is found by asking: "Was defendants' liability *prima facie* established by the government's successful action?" Whenever such liability has been *prima facie* established, any party wishing to justify a settlement offer that amounted to only a small fraction of the ultimate possible recovery would appear to have a very substantial burden of proof. The instant case, however, does not fall into this category.

[*Government Suit*]

Section 5(a) of the Clayton Act enables the decree in a successful government action to be used as *prima facie* evidence of the defendant's violation of the law that is *established in that action.* The decree which resulted from the government's *Grinnell* victory, however, has very little to do with the instant class actions. The government's victory was in large part predicated on defendant's predatory *price cutting* practices which, according to the Court, demonstrated the existence of both monopoly power and an intent to destroy competition. These findings are of dubious value to the class plaintiffs in the present actions. No questions with respect to any injury to *subscribers* were either put in issue or determined in the government action. In fact the basis for the government decree was probably adverse to the interests of these subscriber-plaintiffs,[3] insofar as these plaintiffs, in order to obtain monetary relief, have to prove that the monopolization resulted in artificially *inflated* prices.

Appellants attempt to rebut these facts by introducing the "O'Brien Memorandum", a document written by the Sales Manager of defendant ADT to his immediate superior, which complains of the high prices which that defendant was charging its subscribers. See Appendix Vol. I, at 447G. In addition, they argue that it taxes credulity for defendants to assert that they might conspire against competitors over a prolonged period of time without a desire to benefit financially by overcharging subscribers. Predatory pricing may be a *road* to monopoly power; the *end* of monopoly power may be a hoped-for monopoly profit, an end which can only be finally achieved through illegally *inflated* prices. These arguments represent a shift in ground on the part of appellants. They demonstrate that at its core their case is based not on the decision in the government suit, but rather on the contents of a single document and a logical deduction.

Since defendants' liability was not *prima facie* established it becomes necessary to consider the strength of the case presented by the class members in order to determine whether there is any basis for appellants' claim that the settlement was grossly unfair and inadequate. It cannot be overemphasized that neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute. It is well settled that in the judicial consideration of proposed settlements, "the [trial] judge does not try out or attempt to decide the merits of the controversy," *West Virginia v. Chas. Pfizer & Co., supra,* 314 F. Supp., at 741, and the appellate court "need not and should not reach any dispositive conclusions on the admittedly unsettled legal issues. . . ." *West Virginia v. Chas. Pfizer & Co., supra,* 440 F. 2d, at 1085-86.

The government in its case indeed proved that defendants were guilty of illegal monopolization. This finding, however, is not *prima facie* proof of defendants' liability to their subscribers. Moreover, even the basic question of monopolization, although *prima facie* established, is still open to attack. The determination in the government action does not estop defendants from relitigating

[3] Originally, both competitors and subscribers had joined together after the government action in an attempt to coordinate their private actions against the alarm company defendants. Eventually, competitor and subscriber plaintiffs stopped coordinating discovery because the interests of the two groups relating to the proof of impact and damages rested upon diametrically opposed theories.

the question. See *Emich Motors Corp. v. General Motors Corp.* [1950-1951 TRADE CASES ¶ 62,778], 340 U. S. 558 (1951). They might well carry the day in any new airing of that issue. Three Justices of the United States Supreme Court dissented to a portion of that Court's opinion because they felt that the government's proof of monopolization was based on an unfair definition of the relevant geographic and product-line markets.[4] In its opinion approving the settlement offer this District Court found these market issues, and consequently the whole monopolization question, very much alive. *Detroit v. Grinnell Corp.* [1973-1 TRADE CASES ¶ 74,341], 356 F. Supp. 1380, 1388 (S. D. N. Y. 1972).

Even if the relitigation of the market issues does not succeed in overturning the basic finding of monopolization, it would almost inevitably affect the proof of impact and damages. It appears that the majority of claimants may well be subscribers in "competitive cities", *i. e.*, cities where prices were low and alternative services were open to subscribers. Of the more than 14,000 claims, over 8,800 are apparently from competitive cities, representing approximately sixty-two percent of the total transactions reflected in the claims that have been submitted.

[*Class Status*]

Finally, the record shows that if the proceedings had continued and had not been stopped short by the settlement offer, there would have been a serious question as to whether these actions could have been maintained as class actions at all. In its approval of the settlement offer the District Court outlined some of the factors which militate against the use of the class action device. The separate liability and damage issues present enormous difficulties. There are different competitive climates in each of the locales involved. All the members of a class did not contract for the same services even in the same city. In addition, a substantial administrative burden could have resulted from approval of the class actions urged in this case. The District Court estimated that, at an absolute minimum, the separate liability and damage issues would take at least five years to try. Such necessitous judicial delays and the resulting uncertainty in outcome were all factors which would weigh strongly in any decision to accept a settlement.

The class action issues were thoroughly briefed, argued and orally presented to the District Court. They were *sub judice* when the settlement now before this Court was negotiated and reached. If the agreement is overturned, it then will become necessary for the District Court to decide the issue, since defendants reserved their rights to attack the class action anew.

The objectors dispute each of these points vigorously, but the fact remains that their case is not *prima facie* proven by the government's enforcement action and that several substantial roadblocks stand in the way of any ultimate victory for plaintiffs on the merits. The settlement offer, therefore, is not inadequate as a matter of law and the fact that it consists of one fractional portion of the possible ultimate recovery rather than another is insufficient to indict its legal adequacy at the appellate level.

[*Base Recovery Figure*]

Even if, for the sake of argument, we assume that the District Court's approval of the settlement offer could be called into question because the settlement amounted to a given fractional portion of the ultimate

[4] The defendants were found guilty of monopolizing a national market for accredited central station services. They argue that no matter how their services are defined, they did not compete in a single national market but rather competed in a series of local markets so that, at least for the purposes of evaluating impact, defendants' conduct must be judged in terms of the conditions and activities in each of the areas. Defendants also contend that non-interchangeable services, such as burglar and fire alarms, should not have been lumped together as part of a single market. Moreover, defendants object to the failure to take account of other types of alarm systems, such as direct collection services, local alarms, telephone answering services, and unaccredited central station protection services, in determining the existence of competition.

The dissenting members of the Supreme Court agree with defendants that the majority's attempt to define the geographic market as "the nation" without any consideration for the variances in competition from city to city and its insistence that the relevant product market was restricted to accredited central station protection services "dramatically demonstrates that its [the majority's] action has been Proscrustean—that it has tailored the market to dimensions of the defendants" and that this "gerrymandering market definition" resulted in a "strange red-haired, bearded, one-eyed man-with-a-limp classification." *United States v. Grinnell* [1966 TRADE CASES ¶ 71,789], 384 U. S. at 590-591 (dissent of Fortas, J.). The *New York Times* reported that after having read Justice Fortas' opinion, Judge Wyzanski, the trial judge in the government case, stated that "Justice Fortas went to the heart of my error . . . If I had heard him beforehand, I certainly would have rewritten my opinion." *The New York Times*, May 16, 1969, at 20.

possible recovery, reversal in this case would remain unwarranted. Appellants' argument would hinge entirely on their parallel assertions that the settlement offer: (1) amounts to a mere twelve percent of the potential recovery as that recovery was computed by the District Court, and (2) in fact amounts to less than twelve percent of the real potential recovery which was grossly underestimated by the District Court. The facts do not bear out either of these claims. Contrary to appellants' assertions, the settlement offer was not twelve percent of the District Court's estimate of ultimate possible recovery; rather, it was fully one hundred percent of the District Court's estimate of potential recovery, an estimate that was correctly deduced.

In analyzing the propriety of the settlement offer before it, the District Court largely accepted the plaintiffs' claim that approximately $330 million worth of defendants' billings to them during the 11¼ year damage period were artificially inflated by monopolistic pricing practices. The Court likewise accepted figures supplied by appellants to the effect that from three to seven percent of these billings represented unlawful monopoly profit. This meant that total possible liability for that period was between $9.9 million and $23.1 million. The District Court decided that the $10 million settlement was "well within the ballpark." *Detroit v. Grinnell Corp., supra,* at 1386.

[*Trebling*]

The District Court did not approve a settlement offer that amounted to twelve percent of plaintiffs' potential recovery. Appellants' twelve percent figure is based upon the assumption that potential recovery is not limited to single damages, but rather consists of treble damages. They therefore reach the conclusion, which they inexplicably attribute to the District Court, that ultimate recovery amounts to $69.3 (3 × $23.1) million (they ignore the lower end of the scale which they themselves established). On this basis they calculated that the $10 million settlement offer amounted to only twelve percent [sic] of the $69.3 million potential recovery.

Ignoring for the moment their use of only the top portion of the recovery range, we find that their position turns on the question of whether treble damages ought to be used to calculate the potential liability. Appellants argue that trebling is compelled by the punitive provisions of the which they have submitted on this issue is a recent unreported memorandum opinion of the United States District Court for the Eastern District of Illinois which holds that trebling of the base range is necessary because without it:

> [T]he defendants would retain a substantial portion of any illegal gains rather than be penalized for their violations of the antitrust laws as Congress clearly intended by its provision for treble damages.

Illinois v. J. S. Peterson Coal Co., Civil Action No. 71-C-2548 (E. D. Ill. May 29, 1973).

The Eastern District of Illinois, in turn, cited no authority for its position but rather relied exclusively on the observation that:

> There is nothing in the language or the history of the antitrust laws which suggests that single recovery of the damages sustained by victims of antitrust violations who file claims is the proper measure of their recovery. The provision for treble damages is obviously contrary to such a conclusion.

Id.

While it is true that treble damages are extracted from a defendant who ultimately losses a civil antitrust suit on the merits, there are strong reasons why trebling is improper when computing a base recovery figure which will be used to measure the adequacy of a settlement offer. First, the vast majority of courts which have approved settlements in this type of case, even though they may not have explicitly addressed the issue, have given their approval to settlements which are traditionally based on an estimate of single damages only. See Halper, *The Unsettling Problems of Settlement in Antitrust Damage Cases,* 32 ABA Section of Antitrust Law 98 (1966); Alioto, *The Economics of a Treble Damage Case,* 32 ABA Section of Antitrust Law 87 (1966). Second, to argue that treble damages ought to be considered in a calculation of a base recovery range is to distort the entire theoretical foundation which underlies the settlement process. It requires defendants to admit their guilt for the purpose of settlement negotiations. One of the underlying premises on which such negotiations are based, however, is that defendants never have to concede their guilt. They can protest their innocence of any wrongdoing and assert that they are settling for purely pragmatic business reasons. To require treble damages to be considered as part of the computation of

fendants automatically to concede guilt at the outset of negotiations. Such a concession would upset the delicate settlement balance by giving too great an advantage to the claimants—an advantage that is not required by the antitrust laws and one which might well hinder the highly favored practice of settlement.

In addition to their claim that the twelve percent recovery was unjust as a matter of law, appellants allege that the District Court substantially underestimated the ultimate recovery figure. They claim that ultimate recovery could well amount to $170 million—almost eight times the maximum recovery calculated by the Court, and more than seventeen times the Court's minimum recovery estimate. There is no foundation for such claims.

[*Legal Expenses*]

Appellants first allege that the base recovery figure was substantially understated because it did not include any provision for the claimants' legal expenses.[5] Appellants are not asking that reasonable legal expenses for services actually rendered by their attorneys be added to whatever settlement figure is finally agreed upon. Such a request would fly directly into the face of clear authority which holds that plaintiffs and not defendants are responsible for paying the fees of plaintiffs' attorneys. See *Philadelphia v. Chas. Pfizer & Co., Inc.* [1972 Trade Cases ¶ 74,033], 345 F. Supp. 454 (S. D. N. Y. 1972); *Norman v. McKee, supra.*

Rather, appellants are asserting that the District Court was compelled to inflate its estimate of ultimate possible recovery by adding to it the attorneys' fees authorized by Section 4 of the Clayton Act to plaintiffs who are victorious on the merits—a factor which would increase the potential recovery by as much as $10 million.

This claim must fail for the same reasons that dispose of appellants' treble damage argument. The provision for recovery of attorneys' fees contained in Section 4 of the Clayton Act is dependent upon recovery of a judgment. *Decorative Stone Co. v. Building Trades Council*, 23 F. 2d 426, 428 (2d Cir.), cert. denied, 277 U. S. 594 (1928); *Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers* [1948-1949 Trade Cases ¶ 62,288], 80 F. Supp. 888 (S. D. N. Y. 1948). See also *Trans World Airlines, Inc. v. Hughes* [1970 Trade Cases ¶ 73,142], 312 F. Supp. 478, 483 (S. D. N. Y. 1970), modified [1971 Trade Cases ¶ 73,690], 449 F. 2d 51 (2d Cir. 1971), reversed on other grounds, [1973-1 Trade Cases ¶ 74,295], [409 U. S. 363] (1972). Here, plaintiffs have settled in order to avoid the considerable risk that they would not be able to recover at all. There can be no warrant for urging that in such circumstances the court is required to add on the attorneys' fees that would accrue to plaintiffs only if they were successful in litigating these actions. To do so would be tantamount to a judicial assumption that settlement negotiations were predicated on defendants' admission of guilt. Such an assumption is contrary to the basic principles which underlie settlements.

[*Settlement Period*]

The final portion of appellants' attack on the District Court's computations is the most extreme of all. They contend that the 11¼ years from April 13, 1957, to July 11, 1968, were erroneously denominated as the "settlement period." The true settlement period, according to appellants, should have also covered the "tacit conspiracy" era from 1947 to 1953. Once this is done, they calculate that an additional $90 million should have been added to the potential recovery figure,[6] so that the total cumulative ultimate recovery of plaintiffs, assuming complete victory on the merits, would be in the neighborhood of $170 million, of which the $10 million settlement is between five and six percent.

This claim is rooted in the government enforcement action which found that, for the period between 1947 and 1953, defendants Grinnell and Holmes unlawfully conspired to commit anti-competitive acts with defendant ADT while they were unaffiliated companies and ostensible competitors acting under conditions of free and open competition. The lower court considered the possibility of an extension of the settlement period based on this "fraudulent con-

[5] Appellants judge that legal fees could reasonably amount to ten or fifteen percent of the liability. If liability amounts to $69 million, as it would if treble damages were considered, then reasonable attorneys' fees might amount to as much as $10 million if victory on the merits were ultimately obtained. This would bring the base recovery figure to approximately

[6] Total billings during this period amounted to $400 million. Seven percent of that figure is $28 million, which trebled equals $84 million. If a hypothetical attorney's fee of $6 million is added to this amount, the $90 million figure can be obtained.

cealment" theory and dismissed it, *inter alia*, because "the relationship between the defendants [as affiliated companies] was public and common knowledge for a long time." *Detroit v. Grinnell Corp., supra,* at 1387.

In order to establish fraudulent concealment, a claimant must show: (1) that defendants concealed the basic facts that would reveal the existence of their monopolistic behavior, and (2) that plaintiffs were ignorant of those facts through no fault of their own. See *Moviecolor Ltd. v. Eastman Kodak Company* [1961 TRADE CASES ¶ 69,957], 288 F. 2d 80, 87 (2d Cir.), cert. denied, 368 U. S. 821 (1961). See also *Baker v. F. & F. Investment Company* [1970 TRADE CASES ¶ 73,040], 420 F. 2d 1191 (7th Cir.), cert. denied, 400 U. S. 821 (1970).

[*Fraudulent Concealment*]

Because the statute of limitations in private antitrust suits generally cuts off claims that arise more than four years before the inception of the government enforcement action which tolls that statute until one year after the conclusion of such action,[7] plaintiffs would have been required to present their proof of fraudulent concealment to recover any claims for the period before April 13, 1957 (the government's action having been filed on April 13, 1961). *Moviecolor Ltd. v. Eastman Kodak Company, supra.* If such surreptitious anticompetitive behavior could be demonstrated, the statute of limitations could be extended beyond its typical four year reach to the date when the concealment began. Like the institution of the government action, fraudulent concealment tolls the four year statute of limitations.

The operation of the "government toll" means that the earliest date to which this suit can be extended is April 13, 1957, four years before the commencement of the government enforcement action which tolls the statute under Section 5(b) of the Clayton Act. 15 U. S. C. § 16(b) (1970). One may tack the government toll on to the one arising from fraudulent concealment only if the acts of fraudulent concealment continued into or beyond the earliest day for which recovery could be sought due to the government toll—in this case, April 13, 1957.

Appellants argue that defendants were engaged in acts of fraudulent concealment between 1947, when defendants Holmes and ADT ostensibly terminated their unlawful written agreement of 1906 which divided business, market areas and customers, and 1953, when the continued affiliation between defendants became public knowledge through extensive newspaper publicity which resulted from Grinnell's acquisition of ADT and the Justice Department's inquiry into that acquisition. However, if the fraudulent concealment ended in 1953, then the cause of action for that period may be deemed to have arisen in that year. The earliest date to which this suit can be extended is April 13, 1957. Obviously, under these conditions, there is an unbridgeable gap between 1953 and 1957 and even if fraudulent concealment occurred during the 1947-53 period, suit on events which occurred at that time would be fruitless.

Appellants correctly point out that when an antitrust cause of action is concealed, the statute of limitations does not begin to run when the concealment ends, but rather when the plaintiff either acquires actual knowledge of the facts that comprise his cause of action or should have acquired such knowledge through the exercise of reasonable diligence after being apprised of sufficient facts to put him on notice. *Tracerlab, Inc. v. Industrial Nucleonics Corp.,* 313 F. 2d 97 (1st Cir. 1963); *Crummer Co. v. Dupont* [1958 TRADE CASES ¶ 69,031], 255 F. 2d 425 (5th Cir.), cert. denied, 358 U. S. (1958). Once it appears that the statute of limitations has run, the *plaintiff* must sustain the burden of showing not merely that he failed to discover his cause of action prior to the running of the statute of limitations, but also that he exercised due diligence and that some affirmative act of fraudulent concealment frustrated discovery notwithstanding such diligence. *Laundry Equipment Sales Corp. v. Borg-Warner Corp.* [1964 TRADE CASES ¶ 71,186], 334 F. 2d 788 (7th Cir. 1964); *Moviecolor Ltd. v. Eastman Kodak Co., supra; Starview Outdoor Theatre, Inc. v. Paramount Film Distributing Corp.* [1966 TRADE CASES ¶ 71,683], 254 F. Supp. 855 (N. D. Ill. 1966). See also Dawson, *Undiscovered Fraud and Statutes of Limitation,* 31 Mich. L. Rev. 591 (1933); Dawson, *Fraudulent Concealment and Statutes of Limi-*

[7] (b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15(a) of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . . .
15 U. S. C. § 16(b) (1970).

tations, 31 Mich. L. Rev. 875 (1933). Appellants have not even attempted to make such a showing. Their sole complaint is that appellees have not proven that each of the claimants had actual or constructive knowledge of the fraudulent concealment. However, the burden of proof is upon appellants and not upon appellees. Needless to say, they have neither carried nor attempted to carry this burden. In their reply brief, appellants reverse their field and argue that the fraudulent concealment may well have continued after 1953. They exclaim with some indignation that "there is not an iota of evidence and none is cited by defendants to support *their* bold assertion that the 'concealment ended' in 1953." Appellants' Reply Brief, at 8. (Emphasis supplied). This indignation is ironic in light of the fact that the consignment of the fraudulent concealment to the 1947-53 period was originally the work of the appellants and was simply assumed to be correct by the appellees for the sake of argument. Once again, appellants appear to be shifting to and fro in an attempt to conceal the flaws in their position. Since no appellant has ever tendered any proof to the effect that fraudulent concealment persisted after 1953, that issue must be considered as settled in favor of appellees.

The conclusion is inescapable that the base liability figure against which the District Court measured the settlement offer was in all respects an adequate and fair figure.

Appellants can muster no other arguments to support their contention that the settlement offer was legally inadequate. We, therefore, hold that the District Court's approval was justified and proper.

[*General Approval*]

Any claim by appellants that the settlement offer is grossly and unreasonably inadequate is belied by the fact that, from all appearances, the vast preponderance of the class members willingly approved the offer. Only twenty objectors appeared from the group of 14,156 claimants. The total billings of the objectors consisted of approximately $270,000 during the settlement period or approximately one half of one percent of the billings of all claimants. One hundred and fifty attorneys entered appearances for class members who filed claims; only five of these attorneys objected to the settlement in the court below; only one law firm pursued its objection to this Court. General approval of the terms of the settlement is further indicated by the fact that a number of plaintiffs in the individual subscriber non-class actions have decided to participate in it. Plaintiffs in only thirty-nine of the eighty-four individual cases have decided not to participate and their cases remain pending.

The favorable reception of the settlement offer at the hands of both plaintiffs and the individual attorneys who had little or nothing to do with the negotiation of the settlement is strong evidence that the District Court not only failed to abuse its discretion in approving the settlement but fulfilled its obligation in exemplary fashion.

II.

[*Hearing*]

Appellants next argue that irrespective of the adequacy of the settlement offer, the District Court erred when it refused to permit an additional evidentiary hearing on the propriety of the settlement. They ask, at the very least, that this Court reverse and remand the cases with instructions to the lower court to afford them the opportunity to develop, through discovery, facts which might be germane to the propriety of the settlement.

The rule in this Circuit provides that an approval of a class action settlement offer by a lower court must be overturned if that court acted "without [knowledge of] sufficient facts concerning the claim" or if it "failed to allow objectors to develop on the record facts going to the propriety of the settlement." *Newman v. Stein, supra,* at 692. Yet this directive must be read with the perspective provided by *Young v. Katz,* 447 F. 2d 431 (5th Cir. 1971) which held that:

> It is not necessary in order to determine whether an agreement of settlement and compromise shall be approved that the court try the case which is before it for settlement . . . Such procedure would emasculate the very purpose for which settlements are made. The court is only called upon to consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable [citing *Neuwirth v. Allen,* 338 F. 2d 2 (2d Cir. 1964)].

447 F. 2d at 433.

See also *In Re Riggi Brothers Co.,* 42 F. 2d 174, 176 (2d Cir.), *cert. denied sub nom., Wood & Selick, Inc. v. Todd,* 282 U. S. 881 (1930). When a District Court exercises

its authority in approving a settlement offer, it must give comprehensive consideration to all relevant factors and yet the settlement hearing must not be turned into a trial or a rehearsal of the trial. See also *West Virginia v. Chas. Pfizer & Co., supra,* 314 F. Supp., at 741, 440 F. 2d at 1085-86. The Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case.

The question becomes whether or not the District Court had before it sufficient facts intelligently to approve the settlement offer. If it did, then there is no reason to hold an additional hearing on the settlement or to give appellants authority to renew discovery. There is no doubt that it did. The Court specifically considered: (1) the complexity, expense and likely duration of the litigation, *Detroit v. Grinnell Corp., supra,* at 1388-89; (2) the reaction of the class to the settlement, *Id.* at 1385-86; (3) the stage of the proceedings and the amount of discovery completed, *Id.* at 1386; (4) the risks of establishing liability, *Id.* at 1388; (5) the risks of establishing damages, *Id.;* (6) the risks of maintaining the class action through the trial, *Id.* at 1389-90; (7) the ability of the defendants to withstand a greater judgment, *Id.* at 1389; (8) the range of reasonableness of the settlement fund in light of the best possible recovery, *Id.* at 1387; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation, *Id.* at 1385.

Appellants argue that the hearing which did precede the court's approval mocked justice because they were not given any authority of discovery from which they could fashion an affective presentation. More specifically, the objectors argue that, as a result of their inability to make additional demands for defendants' records, the District Court at no time considered the type of economic data which they declare to be indispensable to any competent judicial evaluation of a settlement offer. To support their claim, the objectors cite the Manual For Complex Litigation which provides that:

> Particularly in civil antitrust class actions in which settlements are proposed is the need of the court for reliable economic data great. In the absence of reliable economic data concerning the damage suffered by each class and subclass as a result of the alleged illegal conduct, a rational determination of what is fair and reasonable cannot be made.

Manual For Complex Litigation § 1.46 (1973).

The general request by appellants for economic information focuses on "data showing class damages" and asks the defendants to supply: a comparison in several other areas of the nation of the differences between defendants' prices and the lower prices of their admittedly peripheral competitors; the number of defendants' competitors; the nature and extent of their competition; and the sizeable barriers to new entry in the industry. What the appellants really seem to be asking for is the right to *begin* discovery from first principles. The record discloses that a great deal, if not all, of this information already exists in the depository and could have come to the attention of appellants' counsel if he had expended the necessary effort.

Appellant's claim that there was a need for further discovery to develop the facts falls flat in view of the extensive evidentiary base already available at the document depository.[8] The objectors asked the Court below to allow them to conduct discovery and to subpoena witnesses for the settlement hearing. Counsel for appellants candidly admitted below, however, that he had not even read the record in the government enforcement action, nor had he spent much time in the document depository.[9] Rather, he remarked that it was not his duty to

[8] The inventory of the depository includes documents produced to the government, depositions taken in the government case, the entire record in the government case, documents produced by and depositions of defendants taken in the Philadelphia actions, as well as hundreds of thousands of additional documents demanded pursuant to Rule 34 by the plaintiffs in these cases. In addition many documents produced by the discovery procedures in the instant cases were placed in the depository. These documents include many spreadsheets of painstakingly assembled transaction data and calculations requested by plaintiffs to support damage theories they planned to assert. One answer by one defendant alone contains hundreds of thousands of statistics on transactions with subscriber plaintiffs. In addition, the documents produced by defendant ADT include the most detailed financial data (*e. g.,* full revenue and cost analyses for each of its approximately 125 central stations) and more than 50,000 competition reports detailing the significant competitive factors pertinent to individual bids and transactions.

[9] "The Court: How many days were you there (at the depository)?

Mr. Kronfeld: We must have been at the depository at least four days.

The Court: What do you think you are going to get out of the depository in four days? The people in Chicago were there for

investigate the material that had already been produced. He claims that since the proponents of the settlement have the burden of justifying it to the satisfaction of the trial court, it remains their duty to produce documents and other evidence to substantiate the offer. He apparently feels that he may sit back and request the production of documents that have already been produced —documents with which he may be unfamiliar simply because he entered the litigation when it was already in an advanced stage.

In general the position taken by the objectors is that by merely objecting, they are entitled to stop the settlement in its tracks, without demonstrating any factual basis for their objections, and to force the parties to expend large amounts of time, money and effort to answer their rhetorical questions, notwithstanding the copious discovery available from years of prior litigation and extensive pre-trial proceedings. To allow the objectors to disrupt the settlement on the basis of nothing more than their unsupported suppositions would completely thwart the settlement process. On their theory no class action would ever be settled, so long as there was at least a single lawyer around who would like to replace counsel for the class and start the case anew. To permit the objectors to manipulate the distribution of the burden of proof to achieve such an end would be to permit too much. Although the parties reaching the settlement have the obligation to support their conclusion to the satisfaction of the District Court, once they have done so, they are not under any recurring obligation to take up their burden again and again *ad infinitum* unless the objectors have made a clear and specific showing that vital material was ignored by the District Court. There is no need for the District Court to hold an additional evidentiary hearing on the propriety of the settlement. Its conclusion appears to have been reached only after a thorough investigation of all relevant facts.

III.

[*Class Status*]

The District Court reserved judgment as to whether a class action ought to be permitted under the circumstances when the parties indicated that such a suspension of judgment would aid their settlement efforts. The settlement itself assumed the existence of a proper class under Rule 23, and for the purpose of approving the settlement, the District Court acquiesced in that assumption. The objectors' third assertion of error focuses on the fact that the District Court approved the class action urged by plaintiffs for the purpose of settlement only.

It is difficult to pinpoint the direction of this particular allegation. On the one hand, appellants seem to be saying that the fact that the District Court assumed the existence of a viable class for the purposes of settlement and refused to make the same legal finding for all other purposes was legal error sufficient in and of itself to void the settlement agreement—even though we are never told exactly why this is so. On the other hand, they seem to argue that because the District Court found a viable class for the purpose of settlement it was legally compelled to make a formal holding along the same lines that would be binding on all aspects of the litigation. The value of this latter argument to the objectors is somewhat remote. Supposedly, if such a formal holding were compelled, that holding would significantly reduce the contingencies of litigation as far as the plaintiffs were concerned. Their chances of ultimate victory on the merits would thereby be strengthened and they would, therefore, be entitled to a larger fraction of the ultimate recovery figure. Even if the objectors' reasoning on this issue were flawless, the extent to which such a conclusion would affect the propriety of the $10 million settlement is problematic at best. Fortunately, we are not to reach these heights of abstraction because we reject the initial premise of the argument.

The foundation of the objectors' claim can be found in the Manual For Complex Litigation (1973) which, in § 1.46, provides that:

> Care should be taken to avoid undesirable, premature, unauthorized settlement negotiations in class actions. Before any settlement negotiations occur, there should be a [formal] class action determination. Thereafter, all settlement negotiations on behalf of the class should be conducted by counsel representing the class in litigation.

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three weeks, an individual plaintiff. Have you gone through the government records from stem to stern?

Mr. Kronfeld: I have not, your Honor, but I have read the opinions of the courts and I have read some of the deposition testimony, and I have read some of the exhibits in the Government case . . . ."

Appendix, Vol. I, at 561.

The Board of Editors that made this recommendation was influenced by many factors. Chief among these elements was the danger, recognized by the Third Circuit in *Ace Heating & Plumbing Co., Inc. v. Crane Co., supra,* that anyone

> who unofficially represents the class during settlement negotiations must be under strong pressure to conform to the defendants' wishes. This is so because such an individual, lacking official status, knows that a negotiating defendant may not like his 'attitude' and may try to reach a settlement with another member of the class. . . . The attorneys' fees and prestige attendant upon probable appointment as class representative are the rewards for the attorney who bargains successfully with the defendants.

453 F. 2d at 33.

The settlement in the case at hand was not negotiated in the early stages of the dispute. Here, all the parties had been able to assess the risks of success after almost four years of litigation. Similarly, the possibilities of internecine conflict were also neutralized by the fact that those national class representatives who had filed suit within the limitations period were all represented by the same counsel. No other representative surfaced until *after* the settlement agreement was reached and widely publicized. Thus, this is not a situation, such as that involved in *Ace Heating & Plumbing Co., Inc. v. Crane Co., supra,* where several different counsel were vying for recognition as class representatives; nor was it a case in which defendants were in any position to play one would-be representative off against the other. There is no allegation that the settlement conflicted with or was adverse to any class members' interest. The major concern of the Manual For Complex Litigation's recommendation against conditional approval of a viable class is absent in this case.

It is true that there were other, additional motivations behind the recommendation of the Board of Editors which proposed the Manual.[10] All of these reasons expressed, in various ways, the Manual's dissatisfaction with the type of settlement which rested on a tentative acceptance of the class designations and was then ultimately forced upon the alleged class with an ultimatum that prevented any effective challenge to the settlement by simply giving class members the choice of accepting its benefits or litigating individually. The instant settlement contained no such harsh directive. Instead, it provided for notice of a hearing and an opportunity to challenge the fairness or any other aspect of the proposed settlement.

To whatever minimal extent the action of the District Court violated the provisions of the Manual For Complex Litigation, it did so by applying the law in this Circuit. *See West Virginia v. Chas. Pfizer & Co., supra; Ace Heating & Plumbing Co. v. Crane Co., supra.* See also *Philadelphia Electric Co. v. Anaconda American Brass Co.* [1968 TRADE CASES ¶ 72,333], 275 F. Supp. 146 (E. D. Pa. 1967); *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.* [1972 TRADE CASES ¶ 73,953], 341 F. Supp. 1077 (E. D. Pa. 1972), rev'd on other grounds [1973-2 TRADE CASES ¶ 74,761], 487 F. 2d 161 (3d Cir. 1973);

[10] Among the additional reasons stated by the Editorial Board are the following:

"(1) Rule 23 [of the Federal Rules of Civil Procedure] does not authorize the formation of tentative classes for the purpose of settlement.

(2) There can be no assurance that the class members will be adequately represented in settlement negotiations until the findings which are conditions precedent to the formation of the class are made by the court after an opportunity for an evidentiary hearing.

(3) . . . It will be impossible to determine . . . the amount of money which will be payable to each member of the class. This information would seem to be essential to making any rational choice whether to remain in the class and to accept the benefits of the settlement or to opt out.

(4) . . . there cannot be a fair recognition in settlement negotiations of the potential liability of the party or parties opposing the class and the potential damages that might be recovered by the class.

(5) Formation of such a class preempts determination of whether the claim for relief should be litigated for the members of the class or should be the subject of further pretrial preparation with a view toward securing a better settlement or a trial on the merits . . .

(6) The formation of the tentative class for the purpose of settlement denies to the class member the choice contemplated by the amended Rule 23 to become a member of the proposed class for the purpose of litigation with adequate representation as a member of the litigating class.

(7) Formation of such a class denies to a member of the class the right to appear in the action as a party and to maintain the position of a litigating party.

(8) Formation of such a class results in a long delay in preparation of the case for trial of those parties who desire to litigate their claims for relief.

(9) In the absence of reasonable discovery conducted on an adversary basis by counsel representing the class, it is impossible to determine whether the proposed settlement has any relation to the economic facts of life relevant to the case."

Manual For Complex Litigation, § 1.46 (1973).

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7A Wright & Miller, Federal Practice and Procedure § 1797 (1972). It must also be remembered that these recommendations were not meant to be intractable rules. If they were applied blindly and without an appreciation of their implicit limitations in given circumstances, they might well jeopardize the right of many plaintiffs to recovery and even invite the likelihood that certain class action suits might never be settled at all.

IV.

[*Defendants' Finances*]

Finally, the objectors have argued that the District Court was persuaded in its decision to approve the settlement by considerations which both lacked evidentiary support and were improperly entertained and which, therefore, constitute grounds for reversal. They urge two specific contentions: (1) that in approving the settlement offer the District Court improperly concluded that it seemed likely that the defendants would be financially incapable of paying a larger judgment, *Detroit v. Grinnell Corp., supra,* at 1389 and, (2) that in approving the settlement offer, the District Court was impermissibly influenced by the likely burden on the judicial system that would accrue if settlement of this class action could not be obtained. *Id.* at 1388-89.

Appellants point out that the District Court only addressed the financial capabilities of defendants AFA and Holmes and did not consider the financial status of either Grinnell or ADT, the two larger defendants. According to the appellants, the lack of a complete inquiry is inexplicable in light of the fact that the liability of the defendants here is both joint and several. See *Sabre Shipping v. American President Lines, Ltd.,* 298 F. Supp. 1339 (S. D. N. Y. 1969). Moreover, they argue, even if all four plaintiffs could be shown to be impecunious, consideration of that fact was not legally permissible.

Appellants have cited no authority for the proposition that the defendants' ability to pay is an improper consideration when approving a settlement offer. Likewise, we are unable to find any such authority. Common sense seems to dictate the necessity, to say nothing of the propriety, of such a consideration. In fact, all available authority defies appellants' analysis. According to the United States Supreme Court: "Further, the judge should form an educated estimate of the complexity, expense and likely duration of such litigation, *the possible difficulties of collecting on any judgment which might be obtained,* and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *Protective Committee v. Anderson, supra,* at 424-25. (Emphasis supplied.)

Although it is true that the District Court did not specifically find that Grinnell and ADT could not bear more than their portion of the settlement, it is obvious that these companies too have their financial limits, particularly in light of the fact that in addition to this $10 million settlement, defendants have paid $12 million to competitors and still have additional cases to defend.

[*Burden on Judicial System*]

Appellants scoff at the fact that the District Court was persuaded to some degree to approve the settlement offer because if settlement could not be reached, the 14,156 claims filed for the settlement period "would have to be individually tried, requiring about 14,000 trial hours on the damage claims alone . . . or about 11 years" and possibly "several judges and juries" so that a "huge amount of judicial time of any single judge and his court personnel would be devoted to the matter." *Detroit v. Grinnell Corp., supra,* at 1388-89. They assert that no authority exists which in any way suggests that burden on the judicial system is a factor to be considered in justifying judicial approval of a class action settlement. Furthermore, they argue that: "The judicial system exists to dispense justice regardless of the burden that may be thrust upon it. And justice implies equal treatment of all litigants—not lesser treatment of those whose causes involve more of a burden on the judicial system than those of others." Appellants' Brief, at 47.

Appellants express an admirable sentiment, but until the day of unlimited judicial resources dawns, the fact will remain that each hour of judicial effort that is expended on the claim of one plaintiff will mean that fewer hours will be available for all others. Thus, the consideration of "judicial burden" does not really amount to a weighing of the interests of the courts against those of the plaintiffs, but rather it is a weighing of the *bona fide* interests of these plaintiffs against the interests of all others who are pursuing just causes of action. Likewise, even if the judicial system would undertake the herculean task which the objectors claim is their right to impose, they offer no proof that any judgment that would be reached

eleven years hence would be sufficiently large, when discounted, to reward the class members for their patience.

The appellants sense the inconsistency of their argument when they conclude by assuring this Court that the trial, when it took place, would not be as unwieldy as the District court portends.

> [T]he lower court clearly exaggerated the burden on the judicial system if these actions were tried on the merits. As this Court and the Judicial Panel have recognized, class action damage trials must be streamlined to permit recovery on the basis of statistical and other economic data.

Appellants' Brief, at 48.

Since there are few reported cases of class actions of this magnitude being litigated all the way to final judgment on the individual class claims, it is not clear exactly how the trial could possibly be handled. Admittedly, the proof of damages in this type of case need not be made with precision and exactitude. See *Zenith Radio Corp. v. Hazeltine Research, Inc.* [1969 TRADE CASES ¶ 72,800], 395 U. S. 100 (1969); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555 (1931); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 (1927). Nevertheless, any suggestion that the alternative to the settlement of these actions is a relatively simple, quickly expedited, clearly defined pathway is both illusory and naive. On the contrary, it is obvious that litigating these cases to completion would take years—the real questions being how many years, at what cost, and with what result?

The evaluation of a proposed settlement requires an amalgam of delicate balancing, gross approximations and rough justice. *Saylor v. Lindsley*, 456 F. 2d 896, 904 (2d Cir. 1972). The District Court has given us much more in this case.

A perusal of the District Court's opinion reveals without question that it was fully aware of the proper standards of settlement evaluation, that it applied each of those standards in its approval of this settlement, and that it entertained no improper considerations. Because the District Court applied the proper and normal standards in evaluating and approving the settlement offer, we can find no abuse of discretion on its part and, consequently, we affirm its decision.

The Fee Award

On December 27, 1972, the District Court rendered its decision approving the settlement and awarding attorneys' fees of $1.5 million, plus disbursements of $14,918.73, to David Berger and his law firm, David Berger, P. A.[11] A second group of appellants objects to the $1.5 million counsel fee award made by the District Court. These appellants claim that this fee award was completely out of proportion to any services performed by counsel and that it reflects the District Court's *de facto* reliance on the contingent fee approach, an approach which, they submit, is impermissible in this type of case. Moreover, appellants point out that contrary to the suggestions of the Supreme Court of the United States and in violation of its own order, the District Court in this case awarded the fee without accepting any testimony, without holding an evidentiary hearing and with only the benefit of oral argument before it.

[*Excessive Fee*]

Because we feel that this fee was excessive and displayed too much reliance upon the contingent fee syndrome and because we feel that an evidentiary hearing was imperative in this case, we reverse and remand this portion of the District Court's judgment and direct that Court to hold such hearings, consistent with this opinion, to provide sufficient information so that a fair and adequate fee award may be made.

Section 4 of the Clayton Act, 15 U. S. C. § 15 (1970),[12] which provides for the award of attorneys' fees in civil antitrust suits generally, "does not authorize award of attorneys' fees to a plaintiff who does not recover a judgment or who settles his claim with the defendant." *Byram Concretetanks, Inc. v. Warren Concrete Products Co.* [1967 TRADE CASES ¶ 72,020], 374 F. 2d 649, 651 (3d Cir. 1967). Similarly, Rule 23 of the Federal Rules of Civil Procedure has no fee provision. The only basis for awarding an attorney's fee in such cases is the equitable fund theory doctrine, which may be used to "make fair and just allowances for

[11] Petitioner had filed a request for $2.5 million in fees. See Petition Of Counsel For The Class Representatives For Award Of Counsel Fees And Costs, Appendix, Vol. II, at 101.

[12] Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court in the United States in the district in which the defendant resides, or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, *including reasonable attorney's fee.* 15 U. S. C. § 15 (1970). (Emphasis supplied).

expenses and counsel fees to [those] parties promoting litigation. . . ." *Trustees v. Greenough,* 105 U. S. 527, 536 (1881). "Allowance of such costs in appropriate situations" has been called "part of the historic equity jurisdiction of the federal courts." *Sprague v. Ticonic National Bank,* 307 U. S. 161, 164 (1938). See also *Mills v. Electric Auto-Lite Co.,* 396 U. S. 375, 391-92 (1970). Under this theory claims may be filed not only by a party to the litigation, but also by an attorney whose actions conferred a benefit upon a given group or class of litigants. The underlying principle here is that the members of the group should pay "compensation as was reasonable" above and beyond reimbursement for out-of-pocket expense to the attorney representing their interests. *Central Railroad & Banking Co. v. Pettus,* 113 U. S. 116, 125 (1885).

The practice of awarding attorneys' fees is one that has been "delicate, embarrassing and disturbing" for the courts. *Milwaukee Towne Corp. v. Loew's Inc.* [1950-1951 TRADE CASES ¶ 62,891], 190 F. 2d 561, 569 (7th Cir. 1951), cert. denied, 342 U. S. 909 (1952). This embarrassment is rooted in the fact that "the bitterest complaints [about the legal profession] from laymen [are directed at] the windfall fees and featherbedding that lawyers have managed to perpetuate through . . . their influence with the judiciary." Graham, *Guest Opinion on Legal Fees: Fluffing the Golden Fleece,* Juris Doctor, 10, 11 (February, 1973).

Unfortunately, there has been more than a little justification for the dissatisfaction of the lay community with the application of the equitable fund doctrine under Rule 23. Criticism has been rampant even within the judiciary. In *Illinois v. Harper & Row Publishers,* 55 F. R. D. 221 (N. D. Ill. 1972), the District Court observed that:

> If Rule 23 is to be preserved against *deserved* criticism, some attempt must be made by the court to suit the award of the fees to the performance of the individual counsel in light of the size of the settlement. Otherwise, the attorneys who are taking advantage of class actions to obtain lucrative fees will find themselves vulnerable to the criticism expressed in the Italian proverb, "A lawsuit is a fruit tree planted in a lawyer's garden."

55 F. R. D., at 224. (Emphasis supplied.)

In a similar vein the United States District Court for the Southern District of New York pointed out: "[I]t [the Rule 23 class action] has resulted in miniscule recoveries by its intended beneficiaries while lawyers have reaped a golden harvest of fees." *Free World Foreign Cars, Inc. v. Alfa Romeo* [1972 TRADE CASES ¶ 73,925], 55 F. R. D. 26, 30 (S. D. N. Y. 1972). Finally, dissenting in *Eisen v. Carlisle & Jacquelin* (1968 TRADE CASES ¶ 72,381], 391 F. 2d 555 (2d Cir. 1968) (Eisen II), then Chief Judge Lumbard wrote: "Obviously the only persons to gain from a class suit are not the potential plaintiffs, but the attorneys who will represent them." 391 F. 2d at 571.

For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding "windfall fees" and that they should likewise avoid every appearance of having done so. To this end courts must always heed the admonition of the Supreme Court in *Trustees v. Greenough, supra,* when it advised that fee awards under the equitable fund doctrine were proper only "if made with moderation and a jealous regard to the rights of those who are interested in the fund." 105 U. S., at 536. See also *Wewoka v. Banker,* 117 F. 2d 839, 841 (10th Cir. 1941). The award must be made with an eye to moderation and, if for no other reason but to allay suspicion, the court should typically take pains to allow a complete airing of all objection to a petitioner's fee claim.

In its simplest terms, the purpose of the fee award is to "compensate the attorney for the reasonable value of services benefiting the . . . claimant." *Lindy Brothers Builders, Inc. v. American Radiator and Sanitary Corporation, supra,* 487 F. 2d, at 167. There are many parameters that affect the value of legal services and which, therefore, must be considered by a court in evaluating a fee request. In another recent antitrust case the District Court which granted the instant fee petition enumerated those parameters. In *Transworld Airlines, Inc. v. Hughes* [1970 TRADE CASES ¶ 73,142], 312 F. Supp. 478 (S. D. N. Y. 1970), modified on appeal [1971 TRADE CASES ¶ 73,690], 449 F. 2d 51 (2d Cir. 1971), rev'd on other grounds [1973-1 TRADE CASES ¶ 74,295], 409 U. S. 363 (1973), the District Court adopted the "generally accepted factors to be weighed in determining a reasonable attorney's fee" from *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* [1965 TRADE CASES ¶ 71,440], 245 F. Supp. 258 (M. D. Pa. 1965), vacated on other grounds [1967 TRADE CASES ¶ 72,067], 377 F. 2d 776 (3d Cir. 1967), aff'd in part and rev'd

in part [1968 TRADE CASES ¶ 72,490], 392 U. S. 481 (1968), viz.:

(1) Whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government,

(2) the standing of counsel at the bar —both counsel receiving the award and opposing counsel,

(3) time and labor spent,

(4) magnitude and complexity of the litigation,

(5) responsibility undertaken,

(6) the amount recovered,

(7) the knowledge the court has of conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial,

(8) what it would be reasonable for counsel to charge a victorious plaintiff.

312 F. Supp., at 480.

Finally, the District Court added that the attorney's "risk in litigation" is another factor to be considered.

This conceptual amalgam is so extensive and ponderous that it is probably not employed in any precise way by those courts espousing adherence to it. That fact is brought home here by the opinion of the District Court which, while eschewing any reliance upon a percentage fee approach, ostensibly applied these cumbersome rules but nevertheless concluded that the fee award ought to amount to $1.5 million, namely, fifteen percent of the settlement recovery.

As the Third Circuit has recently pointed out in *Lindy Bros., supra,* more is needed than a mere listing of factors. Such a list, standing alone, can never provide meaningful guidance.

[*Time Expended*]

The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case. Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.

> No one expects a lawyer to give his services at bargain rates in a civil matter on behalf of a client who is not impecunious. No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended. Yet, unless time spent and skill displayed be used as a constant check on applications for fees there is a grave danger that the bar and bench will be brought into disrepute, and there will be prejudice to those whose substantive interests are at stake and who are unrepresented except by the very lawyers who are seeking compensation.

Cherner v. Transitron Electronic Corp., 221 F. Supp. 55, 61 (D. Mass. 1963).

[*Value of Time*]

Once the District Court ascertains the number of hours that the attorney and his firm spent on the case, it must attempt to value that time. Valuation obviously requires some fairly definite information as to the way in which that time was spent (discovery, oral argument, negotiation, etc.) and by whom (senior partners, junior partners or associates). Once this information is obtained the easiest way for the court to compute value is to multiply the number of hours that each lawyer worked on the case by the hourly amount to which attorneys of like skill in the area would typically be entitled for a given type of work on the basis of an hourly rate of compensation.

> A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time—taking account of the attorney's legal reputation and status (partner, associate). Where several attorneys file a joint petition for fees, the court may find it necessary to use several different rates for the different attorneys. Similarly, the court may find that the reasonable rate for compensation differs for different activities.

Lindy Bros., supra, 487 F. 2d at 167.

We are not under the illusion that a "just and adequate" fee can necessarily be ascertained by merely multiplying attorney's hours and typical hourly fees. However, we are convinced that this simple mathematical exercise is the only legitimate starting point for analysis. It is only after such a calculation that other, less objective factors, can be introduced into the calculus.

[*Risk of Litigation*]

Perhaps the foremost of these factors is the attorney's "risk of litigation," *i. e.,* the

fact that, despite the most vigorous and competent of efforts, success is never guaranteed. The greater the probability of success, of either ultimate victory on the merits or of settlement, the less this consideration should serve to amplify the basic hourly fee. The tangible factors which comprise the "risk of litigation" might be determined by asking the following questions: has a relevant government action been instituted or, perhaps, even successsfully concluded against the defendant; have related civil actions already been instituted by others; and, are the issues novel and complex or straightforward and well worn? Thus determined, the litigation risk factor might well be translated into mathematical terms.

[*Magnitude of Recovery*]

It may be argued that by minimizing the important role traditionally played by the magnitude of the recovery, there will be considerably less incentive for the class attorney, particularly when negotiating a settlement, to seek as high a recovery as possible. Conversely, it can be complained that such a rule will encourage counsel to avoid quick settlement or, indeed, any settlement, in hopes of prolonging the proceedings and accumulating billable hours. Although there may be some truth in these arguments, we feel that their impact can be minimized by an intensified scrutiny on the part of the court which must approve each negotiated settlement.

When it sets a monetary value on a lawyer's services, the District Court must be in possession of an enormous amount of information. It must know how much each contributing lawyer devoted to each task resulting in the formation of the settlement fund; it must be aware of the billing rate properly applied to each of these manhours; and it must be sensitive to those factors, tangible and intangible, which comprise the "risk of litigation."

[*Hearings*]

Because this information is so vital, Rule 11B of the Local Rules of the Southern District of New York provides that:

> Fees for attorneys or others shall not be paid upon the recovery or compromise in a derivative or class action on behalf of a corporation or class except as allowed by the court after a hearing upon such notice as the court may direct.

And, since resolution of disputed factual issues necessitates the hearing of testimony, see *Ellis v. Flying Tiger Corporation,* No. 71-1704 (7th Cir. October 27, 1972) and is particularly facilitated by cross-examination, see *Milwaukee Towne Corp. v. Loew's Inc.* [1950-1951 TRADE CASES ¶ 62,891], 190 F. 2d 561, 571 (7th Cir. 1951), cert. denied, 342 U. S. 909 (1952), one appellate court has been prompted to hold that: "[A]lthough expert opinion evidence is not required in awarding attorneys' fees, where the facts to be weighed in light of the judge's expertise are disputed, an evidentiary hearing is required. See *Thomas v. Honeybrook Mines, Inc.,* 428 F. 2d 981, 988-89 (3d Cir. 1970), cert. denied, 401 U. S. 911 (1971)." *Lindy Bros., supra,* 487 F. 2d at 169.

The Supreme Court endorsed this view in cases involving the award of attorneys' fees under Section 4 of the Clayton Act. In *Perkins v. Standard Oil Co.* [1970 TRADE CASES ¶ 73,235], 399 U. S. 222 (1970), the Court stated that: "[T]he amount of the award for such services should, as a general rule, be fixed in the first instance by the District Court, after *hearing evidence* as to the extent and nature of services rendered." 399 U. S., at 223 (Emphasis supplied). See also *West v. H. K. Ferguson Company,* 382 F. 2d 630, 633 (10th Cir. 1967); *In Re Hudson & Manhattan Railroad Company,* 339 F. 2d 114, 115 (2d Cir. 1964); *In Re Hardwick & Magee Company,* 355 F. Supp. 58, 75 (E. D. Pa. 1973); *Lewis v. Wells,* 325 F. Supp. 382, 387 (S. D. N. Y. 1971).

In the instant case the District Court sent a legal notice, dated December 13, 1971, to all class members informing them of the prospective settlement. Paragraph 6 of that notice proclaimed that:

> [T]he Court has directed that a hearing be held on April 27, 1972. . . . [A]ny member of the class who has not requested exclusion and has timely filed a Sworn Statement of Claim may appear at such hearing in person or by counsel and may show cause, if any he has, . . . why fees and allowances should not be granted and why judgments thereon should not be entered, and may present any evidence that may be proper and relevant to the issues to be heard. . . .

Appendix, Vol. II, at 78.

Contrary to the terms of this notice, the Court made its fee award after it had refused to hold an evidentiary hearing, Hearing of April 10, 1972, at 3, and with only the benefit of oral argument and submitted papers to guide it, in spite of the fact that counsel for the appellants stated to the Court that he "proposed to present

evidence" on the matter of the fee application. Excerpts from Transcript of Hearing Before Judge Metzner, May 24, 1972, Vol. II, at 504; Excerpts from Transcript of Hearing Before Judge Metzner, June 5, 1972, Vol. II, at 558. The most basic dispute focuses on petitioner's claim, rejected by both appellants and third parties, that he and the members of his firm expended 2,357 hours in the litigation of this case.[13] See Statements of Messrs. Robinson, Hoffman & Stein, Appendix, Vol. II, at 270, 296, 242. There is no doubt that, in a case such as this, where there were many vigorous disputes of fact over the elements that comprised the fee award, an evidentiary hearing, complete with cross-examination, is imperative.

[*Factual Voids*]

Even if there were no disputes over the claims made by petitioner, there would still remain a need for an additional hearing to fill the many factual voids which remain before an adequate fee can be fairly determined. Petitioner lumps together the hours for four lawyers in his office whom he calls "senior attorneys" and who allegedly spent 1,814 hours on this case, yet he does not define what he means by the term "senior attorney". Petitioner, likewise, provides no breakdown of any of the time claimed into the various facets of the case. It is conceivable that large amounts of time could have been spent on comparatively routine matters or in ministerial duties.

The court will need to know the experience and training of petitioner's paraprofessional assistants and the rate at which he pays them since he must be reimbursed for their wages even though their time cannot be considered as input in the fee award determination. See *In re Hardwick & Magee Co., supra,* at 58, 73; *Trans World Airlines, supra,* 312 F. Supp., at 482. Finally, there is insufficient evidence regarding petitioner's separate fee arrangements with various members of the classes he represented. Such information is vital to the determination of a fair and adequate fee. *Lindy Bros., supra,* 341 F. Supp., at 1090.

Conclusion

The guidelines to be followed on such a hearing which we adopt have been well summarized in the *Lindy Bros.* case, *supra,* 487 F. 2d, at 168, 170.

> To this end the first inquiry of the court should be into the hours spent by the attorneys—how many hours were spent in what manner by which attorneys. It is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney. But without some fairly definite information as to the hours devoted to various general activities, *e. g.,* pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, *e. g.,* senior partners, junior partners, associates, the court cannot know the nature of the services for which compensation is sought.
>
> * * *
>
> The value of an attorney's time generally is reflected in his normal billing rate. A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time—taking account of the attorney's legal reputation and status (partner, associate).
>
> * * *
>
> Further, in increasing or decreasing an attorney's compensation, the district judge should set forth as specifically as possible the facts that support his conclusion, particularly where, as in this case, the judge determining the fees to be awarded did not sit in the case throughout the entire proceeding. The value to be placed on these additional factors will, of course, vary from case to case. Often, however, their value will bear a reasonable relationship to the aggregate hourly compensation.

We conclude, as did the Circuit Court in *Lindy Bros., supra,* that "the failure of the district court to hold an evidentiary hearing and its failure to follow proper standards in awarding fees to attorneys

[13] Appellee Berger claims to have expended 2,357 hours of attorney's time on behalf of these plaintiffs without regard to the type of work and by whom performed, namely, partner, senior associate, junior associate or clerk. The District Court fee award of $1.5 million thus compensated him at the rate of $635 per attorney-hour.

Appellee has attempted to justify his fee by pointing to other cases where the fee awards were even more grandiose. He observes that in one dispute litigated in the New York State courts, a distinguished practitioner was compensated at the rate of $3,590 per hour. *Sullivan and Cromwell v. Hudson and Manhattan Corporation,* 35 App. Div. 2d 1084, 316 N. Y. S. 2d 604 (1st Dep't 1970), aff'd, 29 N. Y. 2d 523, 324 N. Y. S. 2d 79, 272 N. E. 2d 572 (1971).

However, instead of bolstering his position, these observations merely illustrate the results that accrue when a fee is awarded on a contingency basis without reference to the labor actually expended on the client's behalf.

Kohn and Berger were inconsistent with the sound exercise of discretion."

Fee Apportionment

In addition to the fee petition of counsel for the class representatives, at least three other fee petitions were presented to the Court below.

The three firms of (a) Weil, Gotshal & Manges, (b) Liebman, Eulau, Robinson & Perlman, and (c) Parker, Chapin & Flattau, constitute the so-called "troika", counsel for a number of individual plaintiffs. The "troika" has laid claim to twenty-five percent of the fee awarded class counsel on the ground that their efforts contributed to the formation of the settlement fund. A second attorney, Joel E. Hoffman, of Wald, Harkrader & Ross, likewise filed a petition, Application of Wald, Harkrader & Ross For Apportionment of Counsel Fees, Appendix, Vol. II, at 236, for ten percent of any fee awarded class counsel on the ground that his participation in the pre-trial proceedings conferred a benefit on the class. Finally, Pritchard, McCall & Jones, counsel for certain other plaintiffs, also sought fees for work done in their client's behalf. Application of Pritchard, McCall & Jones For Allowance of Attorneys' Fees, Appendix, Vol. II, at 230.

The District Court held that the three law firms constituting the "troika", along with the firm of Wald, Harkrader & Ross, had standing to assert claims against the fee awarded class counsel. *Detroit v. Grinnell Corp., supra,* at 1393. The Court said that it would set a date for a hearing to determine whether any benefits accrued to the national classes from the activities of these other counsel, and whether the Court should, in equity, award them part of class counsel's fees. *Id.* The Court denied the fee application of Pritchard, McCall & Jones.

Appellants contend that none of these additional fee applications should be entertained by the District Court. Since none of these fees has as yet been allowed, this question is not yet ripe for review and we therefore dismiss this portion of the appeal for lack of jurisdiction.

The basic policy of the federal courts has been that appeal will lie only from a "final decision." *Cobbledick v. United States* [1940-1943 Trade Cases ¶ 56,011], 309 U. S. 323, 324 (1940). "[A] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States,* 324 U. S. 229, 233 (1945). Obviously, the District Court's holding with respect to the standing of the additional petitioners is anything but a "final decision". To support their position appellants are forced to rely on the "collateral order" exception to the final judgment rule which was stated by the Supreme Court in *Cohen v. Beneficial Industrial Loan Company,* 337 U. S. 541 (1949). An order which would otherwise be nonappealable may be appealed when it

> appears to fall in that small class which finally determines claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Cohen, supra, at 546.

These appellants have not demonstrated the applicability of the *Cohen* exception. Indeed, the very language of the *Cohen* decision militates against the appealability of this portion of the District Court's opinion. The Supreme Court specifically cautioned that the exception does not apply "even from fully consummated decisions, where they are but steps towards final judgment in which they will merge." *Cohen, supra,* at 546. There can be no doubt that the District Court's recognition of standing and call for a hearing on the fee applications fits squarely into the definition of an act which is merely a "step . . . toward final judgment in which [it] will merge." Compare *Gibbs v. Blackwelder,* 346 F. 2d 943 (4th Cir. 1965). A final judgment will arise only when the District Court makes a final apportionment of the fee.

The judgment approving the settlement is affirmed; the judgment as to the fee award is reversed and remanded for a hearing in accordance with this opinion; the judgment relating to the standing of other attorneys to participate in any fee award is dismissed for lack of appellate jurisdiction.

[¶ 74,761] **Lindy Bros. Builders, Inc. of Philadelphia et al. v. American Radiator & Standard Sanitary Corp. et al.**

U. S. Court of Appeals, Third Circuit. Nos. 72-1647 and 72-1648. Dated October 31, 1973. Appeal from U. S. District Court, Eastern District of Pennsylvania.

Sherman Act

Class Actions—Settlements—Attorney Fees—Class Representatives—Fee from Non-litigating Claimants—Standards for Award—Evidentiary Hearing.—An award for class representatives' attorneys from settlement fund claimants who had not filed suit was set aside for failure of the district court to hold an evidentiary hearing and for its failure to follow proper standards in determining the amount of the award. The first inquiry of the court should have been how many hours were spent in what manner by which attorneys. Information furnished to the district court that the attorneys had spent "in excess of 6,000 hours in connection with this litigation" was insufficient to support the award. After determining hours spent and fixing a reasonable hourly rate, the court should also consider the contingent nature of success and the quality of the attorneys' work in assessing the value of their services. Then, the court must consider the share to be paid by non-litigating claimants. If these standards had been applied, it would have been clear that an evidentiary hearing was necessary. In the absence of a hearing, it was also error for other attorneys' petitions for fees to have been denied. See ¶ 9032, 9320.

Vacating orders granting and denying attorneys' fees, 1972 Trade Cases ¶ 73,953.

For appellees: Harold E. Kohn and Aaron M. Fine, Philadelphia, Pa., and David Berger and H. Laddie Montague, Jr., Philadelphia, Pa. **For appellants:** William Simon and G. Joseph King, of Howrey, Simon, Baker & Murchison, Washington, D. C., and Donald A. Wine, C. Carleton Frederici and Alan H. Kirshen (Thomas, Schoenthal, Davis, Hockenberg & Wine, of counsel), Des Moines, Iowa.

Before SEITZ, Chief Judge, WEIS, Circuit Judge and SCALERA, District Judge.

Opinion

SEITZ, Chief Judge: These appeals concern the award of attorneys' fees following the settlement of a class action. Two members of the class here involved, Friendswood Development Company and Humble Oil and Refining Company, appeal from the award of fees to attorneys Kohn and Berger and members of their law firms. Also before us is an appeal by attorneys of the firm of Thoma, Schoenthal, Davis, Hockenberg and Wine, who were denied fees. Kohn and Berger are attorneys for Lindy Bros. Builders and the Philadelphia Housing Authority, appellees in both appeals.[1] We will deal first with the appeal of Friendswood and Humble.

[*Class Actions*]

Following the indictment of plumbing fixture manufacturers and their trade association for price-fixing violations of the antitrust laws, numerous civil suits were filed on behalf of several classes of plaintiffs seeking treble damages. One such class action was filed by appellees on behalf of builders and owners shortly after the indictments were returned. The various class actions were consolidated for pretrial proceedings and transferred to the Eastern District of Pennsylvania. Several years of procedural maneuvering followed between plaintiffs and defendants, who wanted the civil suits stayed or enjoined pending resolution of the criminal actions. During the stay proceedings, in which the plaintiffs eventually prevailed, the criminal action proceeded, and on May 2, 1969, a jury verdict was returned against those defendants who had pleaded not guilty.[2] The schedule of depositions in the civil suit was filed in June 1969, and the taking of depositions was to have begun in the fall of 1969.

[*Settlement*]

In October 1969, settlement negotiations were undertaken, primarily by attorneys Kohn and Berger and their firms. The first settlement agreement involving the builder-

[1] No question has been raised as to whether Lindy Bros. Builders and the Philadelphia Housing Authority are the proper appellees. We note that attorneys Kohn and Berger filed a petition for fees in their own name and no request for contribution was made on behalf of the named appellees. See discussion of the nature of equitable claims for attorneys' fees, *infra* [pp. 6-8].

[2] Many of the defendants had pleaded nolo contendere, but several had pleaded not guilty, including some of the larger corporate defendants.

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owner class was reached early in 1970. As a result of the settlement agreement a single fund was created to satisfy the claims of all builder-owners, those who had not filed suit ("unrepresented" claimants) as well as those who had.[3] The district court gave preliminary approval to the settlement plan in May 1971, after the Supreme Court denied defendants' petition for certiorari to review this Court's affirmance of the criminal convictions. In its order preliminarily approving the settlement the district court appointed appellees as Class Representatives. The settlement was given final approval by the district court in April 1972.

[*Fees Sought*]

At the time the district court gave final approval to the settlement, numerous attorneys petitioned for award of fees.[4] Among these was a petition by Kohn and Berger as attorneys for the Class Representatives. Kohn and Berger had private fee agreements with the appellees and also with many other builder-owners who made claims against the fund. In their fee petition, Kohn and Berger asked for an award to be given to them directly in addition to the amounts to be received pursuant to contracts with individual claimants. For purposes of their petition, Kohn and Berger divided the class into four categories. The first category was composed of claimants who had contractual fee arrangements with Kohn and Berger. Kohn and Berger were to receive over $800,000 from these claimants. The second category included claimants who had filed suit and whose attorneys Kohn and Berger felt had contributed to the creation of the settlement fund. Kohn and Berger were to receive no fees from these claimants and sought none. Other claimants who had joined in the suits but whose attorneys Kohn and Berger concluded had not contributed to the creation of the settlement fund comprised the third category. From these claimants, who had contracted to pay varying fees to other attorneys, Kohn and Berger sought a fee award equal to one-sixth of the claimants' share of the settlement fund.[5] The final category was made up of builder-owners who filed claims against the fund, but who had not joined in the suit and, therefore, had not contracted with any attorney participating in the settlement negotiations or other related proceedings. Kohn and Berger asked the court to award them one-third of the amounts to be recovered by these last claimants.[6] The petition was opposed by unrepresented claimants Friendswood Development Company and Humble Oil and Refining Company.

[*Fees Awarded*]

The district court denied Kohn and Berger's petition for fees from the third category of claimants and granted fees from the last category equal to 20% of the amount of the fund apportioned to the unrepresented claimants. Kohn and Berger have not appealed the denial of fees from claimants in category three nor the award of fees from unrepresented claimants in an amount less than requested.

Friendswood and Humble appeal from the award of fees out of the settlement apportioned to them and other unrepresented claimants.

[*Basis for Fee Awards*]

The first contention advanced by Friendswood and Humble is that the court below lacked authority to award any fees to Kohn and Berger. We assume that appellants are correct in stating that Section 4 of the Clayton Act, 15 U. S. C. § 15 (1970), does not authorize award of attorneys' fees to a plaintiff who has settled his antitrust action, rather than pursue it to successful judgment. Cf. *Milgram v. Loew's, Inc.* [1950-1951 TRADE CASES ¶ 62,938], 192 F. 2d 579 (3d Cir. 1951), cert. denied, 343 U. S. 929 (1952); *Decorative Stone Co. v. Building Trades Council*, 23 F. 2d 426 (2d Cir.), cert. denied, 277 U. S. 594 (1928). There is, however authority for the award of fees under the general equitable powers of the court. E. g., *Trustees v. Greenough*, 105 U. S. 527 (1882). These equitable powers may, under the equitable fund doctrine, be used to compensate individuals whose actions in commencing, pursuing or settling litigation, even if taken solely in their own name and for their own interest, benefit a class of persons not participating in the litigation. See *Sprague v. Ticonic National Bank*, 307 U. S. 161 (1939).

[3] At the time the court below ruled on petitions for attorneys' fees, the fund plus interest amounted to approximately $26 million.

[4] Twelve petitions were filed; eleven were denied *in toto*.

[5] At the time of the district court ruling on the fee petitions, the fees sought by Kohn and Berger from this category of claimants amounted to $745,733.

[6] The fees Kohn and Berger asked of unrepresented claimants totalled nearly $2.3 million at the time of their fee petition, bringing the amount requested from the third and fourth categories to over $3 million.

[*Equitable Fund Doctrine*]

Appellants Friendswood and Humble concede that the equitable fund doctrine may provide a basis for award of attorneys' fees in the instant case. They contend, however, that the application for fees should be made by the client or clients who were parties to the action and not the attorneys who prosecuted the action or negotiated the settlement. Clearly, fees may be awarded on the attorney's petition. *Central Railroad & Banking Co. v. Pettus,* 113 U. S. 116 (1885). The thrust of appellants' contention here is more that, regardless of which person files the petition, the right to compensation is in the client rather than the attorney. We think that appellants misconceive the basis for award of attorney fees.

[*Plaintiff's Claim*]

The award of fees under the equitable fund doctrine is analogous to an action in quantum meruit: the individual seeking compensation has, by his actions, benefited another and seeks payment for the value of the service performed. Understood in this way, there are two possible "causes of action" that may be urged as the basis for award of attorneys' fees. One of these "causes" belongs to the plaintiff who brought the underlying suit. His claim is that by instituting the suit he has performed a service benefiting other class members. The reasonable value of that service is measured by the expenses incurred by the plaintiff on behalf of the class. *Trustees v. Greenough, supra,* the seminal case in establishing the equitable fund doctrine, involved this type of claim for attorneys' fees. There a bondholder brought suit on behalf of himself and other bondholders to prevent the trustees of a fund that secured the bonds from committing waste. The judgment for the plaintiff set aside fraudulent conveyances and restored the fund. Relying principally on English cases requiring a trust fund to pay for the costs of its own administration, the Supreme Court affirmed the award to plaintiff of attorneys' fees and other reasonable expenses incurred in the litigation. The Court's decision made clear that the plaintiff must bear his proportionate share of expenses, *id.* at 537-38, and other class members must likewise bear their share of the litigation's expense. *Id.* at 532-37.

[*Attorney's Claim*]

The second "cause of action" for award of attorneys' fees under the equitable fund doctrine belongs to the attorney. The attorney's claim is that his conduct of the suit conferred a benefit on all the class members, that one or more class members has agreed by contract to pay for the benefit the attorney conferred upon him, and that the remaining class members should pay what the court determines to be the reasonable value of the services benefiting them. This claim was presented to the Supreme Court in *Central Railroad & Banking Co. v. Pettus, supra* at 120-21, three years after the *Greenough* decision. In *Pettus,* the Court upheld the award of fees directly to attorneys who had conducted a class action resulting in the establishment of a fund from which numerous creditors of the defendant railroad could be paid.[7] The attorneys had contracted with the complainant and, during the course of the litigation, with certain other creditors for payment of contingent fees from those creditors' shares of the recovery. The Court found that the attorneys were entitled to the reasonable value of the services they rendered to the class members with whom the attorneys had not contracted. *Id.* at 127.

We recognize the close relation between the equitable claims for attorneys' fees that clients and attorneys, respectively, may advance. An attorney's claim for the value of his services to unrepresented class members may be subsumed, fully or partially, in the "expenses" claim of the attorney's client who had paid more than his share of the value of the attorney's services to the class. We need not, however, decide now the manner in which courts should treat such overlapping claims by attorney and client. In this case, the only claims made were by attorneys. In passing upon the sums which represent the value of attorneys' services to unrepresented claimants, we do not intimate any view concerning the ability of these attorneys' private clients to require application against the attorneys' charges to them of all or part of the fees paid by unrepresented claimants.[8] We reject appellants' contention that there is no basis for the award of fees directly to the attorneys absent a finding that such award is necessitated by their clients' interests.

[7] The "fund" in *Pettus* was a lien on the railroad's property.

[8] Cf. *Cherner v. Transitron Elec. Corp.,* 221 F. Supp. 55, 62-63 (D. Mass. 1963).

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Standards Governing Fee Awards

In awarding attorneys' fees, the district judge is empowered to exercise his informed discretion, and any successful challenge to his determination must show that the judge abused that discretion.[9] *Tranberg v. Tranberg*, 456 F. 2d 173, 175 (3d Cir. 1972). Appellants contend that, by failing to observe appropriate standards and procedures, the judge below did abuse his discretion in awarding fees to Kohn and Berger.[10] Friendswood and Humble are correct in arguing that failure to adhere to proper standards and to follow appropriate procedures would constitute abuse of the district court's discretion to award attorneys' fees. We proceed, therefore, to an examination of appellants' claim that the standards applied below in awarding fees to Kohn and Berger were improper.

[*Factors in Making Award*]

The district judge listed four factors that he considered in his award of fees to Kohn and Berger. These were: the percentage of a claimant's recovery awarded as attorneys' fees in other cases, the amount of the recovery from which fees were being awarded, the amount the attorneys received from their clients under private agreements, and the time spent by Kohn and Berger "in connection with this litigation." 341 F. Supp. 1077, 1089-90 (E. D. Pa. 1972). The court below elaborated on these considerations by noting that the percentage of a recovery awarded as attorneys' fees should decline as the amount of the recovery increased and that the time spent by the attorneys was not so important here as in most cases. The judge did not indicate why time was less important here, nor did he explain what use was made of his knowledge of Kohn and Berger's private fee agreements.

[*Time Spent*]

The mere listing of four factors for consideration by the court makes meaningful review difficult and gives little guidance to attorneys and claimants. In detailing the standards that should guide the award of fees to attorneys successfully concluding class suits, by judgment or settlement, we must start from the purpose of the award: to compensate the attorney for the reasonable value of services benefiting the unrepresented claimant. Before the value of the attorney's services can be determined, the district court must ascertain just what were those services. To this end the first inquiry of the court should be into the hours spent by the attorneys—how many hours were spent in what manner by which attorneys. It is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney. But without some fairly definite information as to the hours devoted to various general activities, e. g., pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, e. g., senior partners, junior partners, associates, the court cannot know the nature of the services for which compensation is sought.

Ascertaining, within appropriately specific categories, the time spent is only the first step the district court should follow in determining the proper attorneys' fees to be awarded. In light of the comments of the judge below, however, we wish to make clear its importance. In this case, partly as a result of the procedures employed by the district court, the only information furnished to the district judge regarding the time spent by Kohn, Berger and their associates was that they had spent "in excess of 6,000 hours in connection with this litigation." 341 F. Supp. at 1090. This information was insufficient to support the award of fees to Kohn and Berger.

[*Value of Services*]

After determining, as above, the services performed by the attorneys, the district court must attempt to value those services. In some cases it may be possible to identify the hours spent as having benefited the individual client, the unrepresented claimants, or both. Where this is feasible, the district judge may want to assess directly the value of the attorneys' services

[9] Appellants-attorneys of the Thoma group have argued that we should apply a broader standard of review here because the district judge was not sitting in the initial pretrial proceedings. We reject this contention. Although the district judge should be particularly diligent in setting forth specifically the facts that support his conclusion where he did not sit throughout the entire proceedings, the standard of review to be applied by the appellate court remains the abuse of discretion standard.

[10] Appellants also claim that even if the district judge did observe the proper standards and procedures, he abused his discretion in awarding an excessive fee to Kohn and Berger. In light of our conclusions as to the appropriate standards and procedures, we do not find it necessary to decide this issue.

to the unrepresented claimants without first determining the overall value of the attorneys' services in the case. Here, it would seem artificial to segregate the attorneys' efforts into categories as aiding clients, unrepresented claimants or the entire class. A single fund was created after negotiations on behalf of all claimants. Absent some contrary showing, we presume that all the attorneys' time contributed to the recoveries of each claimant. Where all of an attorney's services benefit the whole class, it seems simplest to determine the value of his services to the class and then to assess the extent to which the unrepresented claimants benefited from these services as compared with the rest of the class.

[*Billing Rate*]

The value of an attorney's time generally is reflected in his normal billing rate. A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time—taking account of the attorney's legal reputation and status (partner, associate). Where several attorneys file a joint petition for fees, the court may find it necessary to use several different rates for the different attorneys. Similarly, the court may find that the reasonable rate of compensation differs for different activities.

Finding the reasonable hourly rate for each attorney does not end the court's inquiry into the value of the attorney's services. The court cannot properly fix attorneys' fees merely by multiplying the hourly rate for each attorney times the number of hours he worked on the case. Before discussing the other factors to be considered in fixing fees, we stress, however, the importance of deciding, in each case, the amount to which attorneys would be entitled on the basis of an hourly rate of compensation applied to the hours worked. This figure provides the only reasonably objective basis for valuing an attorney's services. As Judge Wyzanski observed a decade ago in a case similar to this:

> No one expects a lawyer to give his services at bargain rates in a civil matter on behalf of a client who is not impecunious. No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended. Yet unless time spent and skill displayed be used as a constant check on applications for fees there is a grave danger that the bar and bench will be brought into disrepute, and that there will be prejudice to those whose substantive interests are at stake and who are unrepresented except by the very lawyers who are seeking compensation. *Cherner v. Transitron Electronic Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963).

[*Contingent Nature of Success*]

While the amount thus found to constitute reasonable compensation should be the lodestar of the court's fee determination, there are at least two other factors that must be taken into account in computing the value of attorneys' services. The first of these is the contingent nature of success; this factor is of special significance where, as here, the attorney has no private agreement that guarantees payment even if no recovery is obtained.[11] In assessing the extent to which the attorneys' compensation should be increased to reflect the unlikelihood of success, the district court should consider any information that may help to establish the probability of success. The most important such information in a civil antitrust suit may be the progress of any criminal action brought against the defendants.[12] Here, the United States had obtained indictments against all the defendants before the civil suits were filed; the defendants who pleaded not guilty had been convicted before serious settlement negotiations were begun; and those convictions were affirmed before the court gave final approval to the settlement. The court may find that the contingency was so slight or the amount found to constitute reasonable compensation for the hours worked was so large a proportion of the total recovery that an increased allowance for the contingent nature of the fee would be minimal.

[11] All private agreements here were for contingent fees.

[12] The threshold issue in antitrust cases is the defendant's violation of the antitrust laws. If the defendant in a criminal antitrust action is convicted after a plea of not guilty, the criminal conviction is prima facie evidence of violation of the antitrust laws. 15 U. S. C. § 16 (1970). We recognize that convictions following pleas of nolo contendere are not entitled to the same evidentiary position as convictions following not guilty pleas and that even where violation of the antitrust laws is established, civil plaintiffs must prove that they were injured by the violation.

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[*Quality of Work*]

The second additional factor the district court must consider is the extent, if any, to which the quality of an attorney's work mandates increasing or decreasing the amount to which the court has found the attorney reasonably entitled. In evaluating the quality of an attorney's work in a case, the district court should consider the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of the recovery obtained. This last factor may be the only means by which the quality of an attorney's performance can be judged where a suit is settled before any significant in-court proceedings. In making allowance for the quality of work, the court must keep in mind that the attorney will receive an otherwise reasonable compensation for his time under the figure arrived at from the hourly rate. Any increase or decrease in fees to adjust for the quality of work is designed to take account of an unusual degree of skill, be it unusually poor or unusually good. If the district judge determines that particular work was of atypical quality, he should, in increasing or decreasing the fee, be cognizant of the amount of time devoted to that given activity. Further, in increasing or decreasing an attorney's compensation, the district judge should set forth as specifically as possible the facts that support his conclusion, particularly where, as in this case, the judge determining the fees to be awarded did not sit in the case throughout the entire proceeding. The value to be placed on these additional factors will, of course, vary from case to case. Often, however, their value will bear a reasonable relationship to the aggregate hourly compensation.

[*Unrepresented Claimants*]

After determining the total reasonable value of an attorney's services in securing recovery of a fund for the class, the district court must determine what portion of the amount arrived at should be paid by the unrepresented claimants. Absent extraordinary circumstances, the unrepresented claimant should pay for the attorneys' services in proportion to their benefit from them —that is, the unrepresented claimants should pay a percentage of the reasonable value of the attorneys' services to the class equal to their percentage of the class' recovery. We reiterate that we are not here called upon to decide whether his private clients can require that all or part of the fees recovered by the attorney be applied against the fees charged those clients.

Procedure—Requirement of a Hearing

Friendswood and Humble contend that the district judge erred in failing to grant the requested evidentiary hearing before awarding fees. Had the district court been guided by the proper standards for setting attorneys' fees, the necessity of an evidentiary hearing would have been apparent. In determining the amount of time spent by various attorneys on different activities, the standard billing rate appropriate for each attorney, the extent of the contingency, and the degree to which an attorney's efforts advanced the interests of claimants from whom he seeks fees, the district judge must possess a great deal of information not presented below. Much of the evidence on which the judge will base his award or denial of fees may be disputed; the evidence presented by an attorney petitioning for fees may be incomplete. The denial of fees obviously harms the petitioning attorney. Just as obviously, award of attorneys' fees harms the unrepresented claimant by reducing his net recovery. These opposing interests should be afforded a hearing to provide an evidentiary basis for resolution of disputed factual matters and to allow the parties to supplement possibly incomplete statements of opposing parties.

Courts have noted that expert testimony is not necessary to establish the value of a lawyer's services and have, on that ground, sanctioned the award of attorneys' fees on the basis of affidavits without a hearing. E. g., *Tranberg v. Tranberg, supra* at 175. A judge is presumed knowledgeable as to the fees charged by attorneys in general and as to the quality of legal work presented to him by particular attorneys; these presumptions obviate the need for expert testimony such as might establish the value of services rendered by doctors or engineers. Although expert opinion evidence is not required in awarding attorneys' fees, where the facts to be weighed in light of the judge's expertise are disputed, an evidentiary hearing is required. See *Thomas v. Honeybrook Mines, Inc.*, 428 F. 2d 981, 988-89 (3d Cir. 1970), cert. denied, 401 U. S. 911 (1971). The Supreme Court endorsed the view taken here in *Perkins v. Standard Oil Co.* [1970 TRADE CASES ¶ 73,235], 399 U. S. 222 (1970), a case involving the award of attorneys' fees under Section 4 of the Clayton Act. The Court stated that "[t]he amount of the award for such

services should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered." *Id.* at 223.

We conclude that the failure of the district court to hold an evidentiary hearing and its failure to follow proper standards in awarding fees to attorneys Kohn and Berger were inconsistent with the sound exercise of discretion.

The Thoma Petition

Of the attorneys whose petitions for fees were denied, only one group has appealed. These attorneys are members of the firm of Thoma, Schoenthal, Davis, Hockenberg and Wine (hereinafter "Thoma"). In denying the Thoma petition, which asked for $17,646, the district court did not hold an evidentiary hearing nor was it guided by the standards set forth above. We hold that the denial of the Thoma petition was inconsistent with the sound exercise of discretion.

The orders granting attorneys' fees to Kohn and Berger and denying fees to the Thoma attorneys are vacated and the matters remanded to the district court for further proceedings consistent with this opinion.

[¶ 73,953] Lindy Brothers Builders, Inc. of Philadelphia, et al. v. American Radiator & Standard Sanitary Corp., et al.

U. S. District Court, Eastern District of Pennsylvania. Civil Action No. 41774SC. Filed April 28, 1972.

Sherman Act

Class Actions—Settlements—Settlement Committee Expenses—Defense Attorneys' Membership—Items of Expense.—A petition for expenses incurred by a settlement committee in connection with its administration of the settlement of antitrust class actions was allowed (over an objection to the fact that two attorneys for the defendants were members of the committee and would be paid fees representing the time they spent in assisting in the administration of the settlement). Expenses covered included substantial expenses for printing, advertising and distributing class notices, processing the more than 10,000 claims that were filed, and for other necessary duties. Included in the amount claimed were expenditures for computer and data processing services necessary in administering the settlement. A total of $223,119.23 was sought. See ¶ 9032, 9326.

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[2] Petitioner's state court cross-action against the United States was by its terms based on "Rule 22 of the U. S. Rules of Civil Procedure." However, under Fed. Rule Civ. Proc. 22, a defendant seeking interpleader must frame his pleading either as a cross-claim seeking relief against a co-party already in the lawsuit, or as a counterclaim seeking relief against the plaintiff. If the defendant states a claim seeking relief against such a co-party or plaintiff-counter-defendant, he may seek to bring in additional parties under the joinder provisions of Rule 20. But the interpleader provided by Rule 22 must have some nexus with a party already in the case. As noted above, petitioner's interpleader claim sought no relief against any other party in the action.

Class Actions—Settlements—Expenses—Non-litigants' Obligation.—Claimants who are not litigants should be required to pay their fair share of the out-of-pocket expenses of those claimants who have actually filed suit and who thereby brought about the creation of the settlement fund. See ¶ 9326.

Class Actions—Expenses—Settlement Committee and Out-of-Pocket Litigation Costs—Deduction from Settlement Fund.—Equitable considerations dictating that expenses actually incurred in suits brought by class representatives should be shared *pro rata* by all claimants, out-of-pocket litigation expenses were allowed in accordance with the procedure followed in a prior settlement. Both the expenses of the settlement committee and the out-of-pocket litigation expenses were deducted from the total amount of the settlement fund before the fee computations were made. Then expenses were allowed as they related to creation of the particular settlement fund. See ¶ 9032, 9326.

Class Actions—Settlements—Attorney Fees—Participation in Creation of Settlement Fund—Role of Attorneys.—The attorneys principally responsible for a class action settlement were not entitled to a fee for the claims of those litigants represented by counsel who, it was contended, did not contribute to the creation of the settlement fund, since the facts did not bear out the contention. No settlement would have been possible without the cooperation and efforts of numerous attorneys for plaintiffs who filed suit; the fact that an extremely large number of suits were filed against the defendants in many different districts necessarily helped bring about the agreement which produced the substantial settlement fund to be distributed. The claimants who undertook to incur the risk of litigation should not be penalized by being required to pay larger attorneys' fees than any other claimant merely because their attorneys may not have, in the opinion of counsel for the class representatives, contributed as much to the creation of the settlement fund as did others. See ¶ 9032, 9320.

Class Actions—Settlements—Attorney Fees—Class Representatives—Fee from Non-litigating Claimants—Objections.—Objections to class representative attorneys' receiving fees for claims of claimants who would receive distributions from the settlement fund but who either did not file suit or were not included as settling parties were rejected. It was urged that no allowance of fees should be granted because the attorneys would be adequately compensated by their private contingent fee arrangements with their clients and no additional fee would be charged against the non-litigating claimants. Also, it was argued that, since application for fees was filed by the attorneys themselves, rather than by the parties, they could not be considered by the court under equitable principles—that since the assessment of an attorney's fee against the portion of the settlement fund to be distributed to non-litigating parties would not reduce the fees to be paid by the litigating claimants themselves, the application should be denied completely. See ¶ 9032, 9320.

Class Actions—Settlements—Attorney Fees—Percentage of Recovery of Non-litigating Claimants.—Attorneys for the class representatives, principally responsible for creation of the settlement fund, were awarded attorney fees for claims of claimants who would receive distributions from the fund but who either did not file suit or were not included as settling parties. However, the request for 33⅓% was rejected as excessive, and reduced to 20% of the amount distributed to the claimants. Factors applied in arriving at the determination included (1) past awards, (2) the size of the recovery (the larger the recovery the less should be the percentage of the award), (3) the amount already to be recovered through private arrangements with their own clients, and (4) time spent. See ¶ 9032, 9320.

Class Actions—Settlements—Contingent Fees—Court Approval by Agreement of Attorneys and Client—One-Third.—A contingent fee charge of one-third was approved by the court for attorneys who, by agreement with a number of clients participating in a class action, left the determination of the percentage to the court. Most of the clients had agreed to that figure, which was an acceptable one in the Philadelphia area for clients dealing with the attorneys. The test for determining what is a proper contingent fee to be charged a private client is entirely different from the test for determining what is a reasonable fee for class representation in a class action settlement. See ¶ 9032, 9320.

Class Actions—Settlements—Attorney Fees from Settlement Fund—Limitation to Class Representatives.—Objections by attorneys for class representatives, who were prin-

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cipally responsible for creation of a settlement fund, to petitions for fees for 12 attorneys out of the settlement fund, were accepted and the awards denied. Whatever contribution others made to the creation of the fund was minor when compared to that of the representatives' attorneys and each of the petitioning attorneys was adequately compensated by fees to be paid by clients, among other reasons. See ¶ 9032, 9320.

For class representatives: Harold E. Kohn and Aaron M. Fine, Philadelphia, Pa. For builder-owner settlement committee: Harold E. Kohn, Patrick T. Ryan, and Edward W. Mullinix, Philadelphia, Pa., Thomas W. Mack, Washington, D. C., and Elwood S. Kendrick, Los Angeles, Cal. For fee petitioners: John Edward Burke and Ross, Hardies, O'Keefe, Babcock & Parsons, Chicago, Ill., John A. Cochrane and Cochrane & Bresnahan, P. A., St. Paul, Minn., Howard M. Downs and Howard, Prim, Smith, Rice & Downs, San Francisco, Cal., C. Carleton Frederici and Thomas, Schoenthal, Davis, Hockenberg & Wine, Des Moines, Ia., Paul R. Connolly and Williams, Connolly & Califano, Washington, D. C., Sidney Harris and Arent, Fox, Kintner, Plotkin & Kahn, Washington, D. C., Mark I. Harrison and Harrison, Myers & Singer, Phoenix, Ariz., Mitchell A. Kramer, Philadelphia, Pa., Jerrold E. Salzman and Freeman, Freeman & Salzman, Chicago, Ill., Paul D. Scanlon and Burkhardt, Arnavas & Bartl, Alexandria, Va., and Frederick D. Steinhardt and Travis, Warren, Nayer & Burgoyne, Detroit, Mich. For settling plaintiffs: Josef D. Cooper and Friedman, Koven, Shapiro, Salzman, Koenigsberg, Specks & Homer, Chicago, Ill., Allen Horstman and Wooden, Stark, McLaughlin & Sterner, Indianapolis, Ind., Michael I. Miller and Isham, Lincoln & Beale, Chicago, Ill. For claimants: William Simon and Howrey, Simon, Baker & Murchison, Washington, D. C., for Humble Oil and Refining Co. and Friendswood Development Co. For defendants: William E. Willis and Sullivan and Cromwell, New York, N. Y. For shortline defendants: Edward W. Mullinix and Schnader, Harrison, Segal & Lewis, Philadelphia, Pa.

Harvey, District Judge: Presently before the Court in this multidistrict antitrust litigation are various applications seeking substantial allowances of attorneys' fees and expenses. These applications have been filed in connection with the Court's consideration of the final approval of a settlement of the claims of members of a national class of builder-owners against the defendants herein who are manufacturers of plumbing fixtures.[1] Inasmuch as this litigation has included claimants at various different levels of the chain of distribution of plumbing fixtures, separate settlements have been negotiated between the settling defendants involved and separate classes of claimants. The settlement presently before the Court compromising the claims of a nation-wide class of builder-owners, involves the largest amount and the largest number of claimants in this litigation. The result has been that the number of and the amount of the fee applications filed are far greater and the issues involved have been much more hotly contested than those in any of the other settlements.

The plumbing fixture antitrust litigation includes the largest number of cases ever transferred to a single district by the Judicial Panel for Multidistrict Litigation for consolidated pre-trial proceedings under 28 U. S. C. § 1407. At last count, some 370 cases have been either commenced in this District or transferred here by the Panel. The nature and history of this massive litigation has previously been fully discussed in opinions of this Court and of the Panel. These opinions are listed in *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation* [1970 Trade Cases ¶ 73,346], 323 F. Supp. 364 (E. D. Pa. 1970), at page 365, footnote 1.[2]

[*Settlements*]

Insofar as the matters presently before the Court are concerned, no more than brief mention of the other settlements is necessary. At a hearing held on December 7, 1970 in connection with Settlement Order No. 1, this Court approved a settlement for a national class of wholesalers in the amount of $1,000,000. Applications for fees

[1] As explained in previous opinions of this Court, there are two groups of defendants, the "full-line defendants" and the "short-line defendants." One of the full-line defendants, Briggs Manufacturing Company, is not a party to any of the settlements in this litigation.

[2] Later opinions of this Court, of the Panel and of the Third Circuit are reported at [1971 TRADE CASES ¶ 73,457], 322 F. Supp. 834 (E. D. Pa. 1971) [1971 TRADE CASES ¶ 73,410], 323 F. Supp. 381 (E. D. Pa. 1970) [1971 TRADE CASES ¶ 73,725], 332 F. Supp. 1047 (J. P. M. L. 1971), 438 F. 2d 1187 (3rd Cir. 1971) [1971 TRADE CASES ¶ 73,762], 453 F. 2d 30 (3rd Cir. 1971).

and expenses were likewise considered, and various allowances were approved.[3]

Although the wholesalers' settlement had been unopposed, a proposed $2,000,000 settlement for a nation-wide class of plumbing and other contractors was vigorously opposed by a small number of plaintiffs. In Settlement Order No. 2, this Court gave preliminary approval to that proposed settlement. Certain plaintiffs thereupon filed a motion to vacate that order. Following a hearing, such motion was denied for the reasons set forth in this Court's opinion in *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation* [1970 TRADE CASES ¶ 73,346], 323 F. Supp. 364 (E. D. Pa. 1970). Subsequently, another hearing was held to consider final approval of the contractors' settlement and various applications for the allowance of attorneys' fees and expenses to be paid from that fund. Again, there was opposition to the settlement. For the reasons stated in *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation* [1971 TRADE CASES ¶ 73,457], 322 F. Supp. 834 (E. D. Pa. 1971), this Court gave final approval to the contractors' settlement, awarded certain attorneys' fees and expenses and denied certain other applications for fees.[4]

An appeal was thereupon taken by certain plaintiffs from this Court's Order giving final approval to the contractors' settlement and also from this Court's refusal to grant a fee to one of the petitioning attorneys. In *Ace Heating and Plumbing Company v. Crane Company* [1971 TRADE CASES ¶ 73,762], 453 F. 2d 30 (3rd Cir. 1971), the Third Circuit affirmed the Court's Order approving the settlement but modified the fee allowances to include an additional $3000 fee to be paid to attorney Lawrence Walner, for his services in connection with the creation of the settlement fund.

Following approval of the contractors' settlement, various public bodies' settlements were next presented to the Court. Unlike the other settlements in this litigation, the public body cases were not settled under a single agreement between plaintiffs and defendants. The full-line defendants had offered to pay $1,750,000 to settle all public body claims, and the short-line defendants had contributed various sums to the settlement funds thereby created. Final approval has now been given to most of these settlements which were separately presented to the Court, and various requested attorneys' fees and expenses have been allowed.

On May 17, 1971, a hearing was held to consider preliminary approval for the proposed builder-owner settlement. This settlement fund consisted of $21,500,000 from the full-line settling defendants and $1,400,000 from the short-line settling defendants, or an original total of $22,900,000 plus interest. However, the parties had agreed that interest would accrue from April 1, 1970 on the portion of the fund paid by the full-line defendants and from September 1, 1970 on the portion of the fund paid by the short-line defendants. It is estimated that as of May 31, 1972, the aggregate amount of the settlement fund will be some $25,955,000.

On May 28, 1971, this Court entered Settlement Order No. 21 which gave preliminary approval to the proposed builder-owner settlement and appointed the plaintiffs in Civil No. 41,774 as the Class Representatives. A committee of attorneys was also appointed by the Court to carry out the provisions of this Order.[5] Thereafter, the plaintiffs in *Arntz Bros. v. American Radiator and Standard Sanitary Corporation*, Civil No. 70-276, represented by Howard M. Downs, filed a motion to vacate Settlement Order No. 21. Subsequently, Mr. Downs accepted the settlement on behalf of the plaintiffs that he represented and withdrew his motion.

On April 7, 1972, a hearing was held to consider whether the builder-owner settlement should be finally approved, and whether applications for attorneys' fees and expenses should be granted. The only opposition to final approval was that of Mr. Downs who, although he had previously accepted the settlement on behalf of his clients and had even filed an application for the allowance of a fee and expenses,

[3] A fee for counsel for the Class Representatives was approved in the amount of 15% of the net settlement fund. As compared with some of the other settlements in this litigation, the wholesalers' settlement presented fewer complications, and less time was spent by the attorneys than in the others.

[4] Attorneys' fees in the amount of 25% of the net settlement fund were allowed in connection with the approval of the contractors' settlement. This amount was divided into 14 equal shares with 3 shares being paid to counsel for the Class Representative and the remainder being divided among 16 plaintiffs' attorneys who had contributed to the creation of the settlement fund.

[5] The Settlement Committee was composed of Messrs. Kohn, Kendrick, and Mack, representing the plaintiffs, and Messrs. Ryan and Mullinix, representing the defendants.

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repeated certain objections that he had made earlier and withdrawn. After hearing argument, the Court overruled these objections and indicated that it would give final approval to the settlement as submitted. Findings of fact, conclusions of law and other necessary orders will be hereafter entered approving this settlement.

At the April 7, 1972 hearing, the Court next heard arguments in support of and in opposition to the various applications for attorneys' fees and expenses that had been filed. It is the sharp conflicts resulting from the substantial fees and expenses claimed which the Court is now called upon to resolve.

[*Fees and Expenses*]

Applications for the allowance of fees and expenses from the settlement fund are of three different types:

(1) A petition filed by the Settlement Committee seeking reimbursement of its expenses in administering the settlement in the amount of $223,119.23.

(2) A petition filed by Harold E. Kohn and David Berger jointly, as attorneys for the Class Representatives, for the award of counsel fees and expenses. From the settlement fund, they seek reimbursement of their expenses amounting to $42,380 and attorneys' fees aggregating some $3,036,825. (The fees have been computed on the basis of figures supplied to the Court as of April 18, 1972).

(3) Eleven petitions filed by attorneys who claim to have contributed to the creation of the settlement fund and who seek fees and expenses to be paid from such fund.[6] Each of these attorneys represents plaintiffs who have filed suits in this litigation and who will therefore receive distributions from the fund in varying amounts. The attorneys involved and the amounts of the fees plus expenses claimed are as follows:

1. John Edward Burke	$100,000.00	plus	$ 8,619.00
2. John A. Cochrane and Floyd E. Boline, jointly	116,000.00	plus	5,997.17
3. Paul R. Connolly	A reasonable fee	plus	28,194.46
4. Howard M. Downs	97,500.00	plus	23,537.29
5. C. Carleton Frederici	17,646.50	plus	4,971.94
6. Sidney Harris	37,275.00 to 55,912.00	plus	18,550.94
7. Mark I. Harrison	6,745.60	plus	3,916.32
8. Mitchell A. Kramer	7,537.50	plus	824.20
9. Paul D. Scanlon	627,600.00	plus	23,265.57
10. Frederick D. Steinhardt	25,600.00	plus	2,742.06
11. Lawrence Walner	30,500.00	plus	1,110.00

[*Opposition*]

Opposition to the award of any attorneys' fees to be paid from the settlement fund to any petitioning attorneys has been filed by two claimants, namely, Humble Oil and Refining Company and Friendswood Development Company. These claimants did not file suit against the defendants but have duly filed claims which will permit them to share in the distribution of the settlement fund. They object to the allowance of any fees to petitioners Kohn and Berger or to any of the other petitioning attorneys, claiming that all the plaintiffs' attorneys involved will be adequately compensated under their private fee agreements with their clients. Petitioners Kohn and Berger object to any allowances to the 12 attorneys listed hereinabove, and a number of the latter, as well as other counsel for litigating claimants, object to the charging of any portion of the Kohn and Berger fee against that part of the fund to be distributed to their clients.

[*Fees and Expenses in Class Action Settlements*]

Among the detailed provisions of Rule 23 of the Federal Rules of Civil Procedure, there are none which specifically deal with the awarding by the Court of attorneys' fees and expenses in connection with the approval of a class action settlement. Rule 23(e) does no more than require the approval by the Court of the compromise or settlement of a class action. Authority for fixing attorneys' fees claimed by those responsible for the creation of a settlement fund arises under the general equitable powers of the Court. Where the efforts

[6] Twelve separate petitions were submitted in all. One was filed jointly by two different attorneys. Another, filed by Jerrold E. Saltzman, was unopposed. It merely sought (and received) approval by the Court of the amount of a contingent fee to be charged and paid from certain distributions, pursuant to an agreement between such attorney and his clients.

of a claimant and his attorneys have produced a fund to be divided among all members of a particular class, it has been recognized first, that the claimant as the representative of the class is authorized to contract for all and to incur proper expenses of litigation, and secondly, that the property produced by the efforts of such plaintiff and his attorney should bear the burden of the expense of the attorney's services so that each member of the class who benefits will contribute his due proportion. *Trustees v. Greenough*, 105 U. S. 527 (1882); *Sprague v. Ticonic National Bank*, 307 U. S. 161 (1939); *Mills v. Electric Auto-Lite Company*, 396 U. S. 375 (1970); *Kahan v. Rosenstiel*, 424 F. 2d 161 (3rd Cir. 1970), cert. den. 398 U. S. 950 (1970); *Philadelphia Electric Company v. Anaconda American Brass Company* [1969 TRADE CASES ¶ 72,892], 47 F. R. D. 557 (E. D. Pa. 1969); *Paris v. Metropolitan Life Ins. Co.*, 94 F. Supp. 792 (S. D. N. Y. 1947); 3B *Moore's Federal Practice*, ¶ 23.91.

[*Grounds for Allowances*]

Counsel for the Class Representatives and also each plaintiff's attorney seeking an award from the settlement fund was required by the Court to file a petition detailing the grounds for the requested allowance. After a preliminary review of the petitions filed, the Court addressed a letter dated March 14, 1972 to each petitioning attorney, requiring the furnishing of further pertinent details to the Court in instances in which the original petition had been incomplete.[7] In particular, each applicant was required to state the amount and a break-down of any expenses claimed, the time expended, the details concerning private fee arrangements between the applicant and his clients, the total number of units represented by the applicant in the settlement,[8] the fee expected by the applicant as a result of the allowance of his client's claims, a list of the civil cases in this litigation in which the applicant was counsel of record including the date and place where suit was filed, whether there existed agreements between the applicant and any other attorney as to the sharing of any part of the fee claimed, whether the applicant had received or expected to receive a fee for representing claimants in any settlement in this litigation other than the builder-owner settlement, and if so, whether there was any overlapping in the hours expended in connection with the other settlements.

[*Discovery and Hearing*]

Claimants Friendswood and Humble Oil urge that the Court permit discovery and thereafter conduct an evidentiary hearing before deciding any of the questions presently before it. This Court concludes that no such further hearing is necessary. The detailed original and supplementary petitions that have been filed together with attached affidavits and exhibits, when considered in the light of the arguments and this Court's knowledge of these proceedings, constitute a sufficient record for determination of the issues here. No affidavits have been filed in opposition to those submitted by the petitioning attorneys. In assessing the value of an attorney's services, a court is itself an expert on the question and may make its judgment as to the amount to be awarded from its own knowledge and experience of reasonable fees and from the facts before it without the aid of the testimony of witnesses as to value. *Powell v. Pennsylvania Railroad Company*, 267 F. 2d 241, 245 (3rd Cir. 1959), quoting from 7 C. J. S. *Attorney and Client*, § 191d, p. 1093. After hearing argument from counsel at the all-day hearing held on April 7, 1972, this Court is satisfied from its knowledge of the nature and history of this litigation and from its review of the pleadings, affidavits, briefs and exhibits that the questions presently before it can be decided without the necessity of an evidentiary hearing.

I

The Application of the Settlement Committee for Expenses

In connection with its administration of the settlement, the Settlement Committee incurred substantial expenses for printing, advertising and distributing the class notices, for processing the more than 10,000 claims which were filed, and for other necessary duties. Included in the amount claimed are expenditures for computer and data processing services necessary in administering the settlement. A total of $223,119.23 is sought.

The only objection to any part of this claim was made by Mr. Downs, attorney for plaintiffs in *Arntz Bros v. American*

[7] All but one of the petitioners filed a supplementary petition furnishing the information requested.

[8] Claims were classified by the Settlement Committee in terms of the number of units purchased by the claimant within the applicable time period. Plumbing fixtures for one whole bathroom were counted as one unit.

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Radiator and Standard Sanitary Corporation, supra. He objected to the membership of two attorneys for the defendants on the Settlement Committee and to the payment of certain fees to such attorneys representing time they spent in assisting in the administration of the settlement.

Attorneys for the defendants likewise were members of the Settlement Committee appointed to administer the contractors' settlement, and the allowance of fees to them was also attacked in the appeal from that settlement. Such objection was overruled by the Third Circuit in *Ace Heating and Plumbing Company v. Crane Company, supra.* In affirming this Court's previous Order, the Third Circuit noted that "to guarantee fairness in these situations provision for participation of defense counsel on settlement committees should be made part of the negotiated settlements and be specifically included in the notice to class members." 453 F. 2d at 34. However, *Ace Heating and Plumbing Company* was decided on November 18, 1971. By that date, the notice to the class members in this settlement had already been sent out in a form similar to that in the contractors' settlement. Inclusion of defense counsel on the Settlement Committee was specifically provided for in Settlement Order No. 21 as proposed, and no objection was made to such provision at the hearing held on May 17, 1971 by Mr. Downs or by any other plaintiff.

Representatives of the defendants were included on this Settlement Committee because of their detailed knowledge of the litigation and settlement, and it was expected that time could be saved if their knowledge were used to assist in administering the settlement. In any event, amounts paid to the attorneys in question were minor compared to the total expenses of the Settlement Committee and were calculated solely on a time basis and at a designated hourly rate. The objection to the allowance of this portion of the Settlement Committee's application is accordingly denied, and the $223,119.23 claimed is allowed in its entirety, to be deducted from the settlement fund before any other payments or allocations are made.

II

The Applications of all Petitioning Attorneys for Expenses

Not only the attorneys for the Class Representatives but also the other petitioning attorneys seek reimbursement on behalf of the plaintiffs they represent of their out-of-pocket expenses incurred in connection with the filing and prosecution of suits in which petitioners were counsel of record. Similar expenses were allowed as deductions from the settlement funds in the wholesalers' and contractors' settlements. As this Court said in approving the award of expenses in connection with the contractors' settlement, "claimants who are not litigants should be required to pay their fair share of the out-of-pocket expenses of those claimants who have actually filed suit and who thereby brought about the creation of the settlement fund." [1971 TRADE CASES ¶ 73,457] 322 F. Supp. at 839.

Indeed, if those plaintiffs who are now seeking reimbursement of their litigating expenses had not been willing to undertake the risk of incurring these substantial expenses, the non-litigating claimants might not today be recovering the sums to be distributed to them. The equitable rule against saddling the active representatives of a class with the entire expenses of legal efforts of benefit to all should not be applied in a narrow or technical manner. *Thomas v. Honeybrook Mines, Inc.,* 428 F. 2d 981, 985 (3rd Cir. 1970). Equitable considerations therefore dictate that those expenses actually incurred in suits brought by builder-owners should be shared *pro rata* by all claimants who will be receiving distributions from the fund. In accordance with the procedure followed in connection with the contractors' settlement, both the expenses of the Settlement Committee and the out-of-pocket litigation expenses herein allowed should first be deducted from the total amount of the settlement fund before the fee computations hereinafter required are made. However, not all the expenses claimed by the various petitioning attorneys are properly related to creation of this particular settlement fund. Accordingly, the following out-of-pocket litigation expenses are hereby allowed:[9]

Harold E. Kohn	$42,380.00
John Edward Burke	8,619.00
John A. Cochrane jointly with Floyd E. Boline	5,997.17
Paul R. Connolly	28,194.46
Howard M. Downs	23,537.29
C. Carleton Frederici	4,971.94
Sidney Harris	18,550.94
Mark I. Harrison	3,916.32
Mitchell A. Kramer	824.20

[9] Some of the attorneys listed were counsel of record in only one suit, others in more than one. One of the attorneys had filed nine actions against the defendants and another ten.

Paul D. Scanlon	$ 2,265.57 [10]
Frederick D. Steinhardt .	2,742.06
Lawrence Walner	1,110.00

III

Application of Petitioners Kohn and Berger for Attorneys' Fees

For the purpose of computing the attorneys' fees which they claim, petitioners Kohn and Berger have divided the settlement fund into four separate categories as follows:

1. The claims of those litigants represented by petitioners Kohn and Berger, totaling 492,754.6 units;

2. The claims of those litigants represented by attorneys whose efforts these petitioners contend contributed to the creation of the settlement fund, totaling 1,017,061.2 units;

3. The claims of those litigants represented by counsel whose efforts petitioners contend did not contribute to the creation of the settlement fund, totaling 470,989.2 units; and

4. All other claims, being those of claimants who would receive distributions from the fund but who either did not file suit, or were not included as settling parties, totaling 723,502.6 units.

Petitioners Kohn and Berger seek no fees from that portion of the fund to be distributed to claimants in Categories 1 and 2. Insofar as Category 1 is concerned, these petitioners will receive fees amounting to some $802,707 under private agreements they have entered into with these claimants. Most of these agreements provide for the payment of contingent fees amounting to 33⅓% of the recovery. A few provide that this Court will fix the amount of the contingent fee to be charged, and as to certain other claimants, the fees will be fixed by a bankruptcy court. Insofar as Category 2 is concerned, the attorneys representing the claimants involved will also be compensated under contingent fee agreements with their clients.

Petitioners Kohn and Berger seek a fee amounting to 16⅔% of the amounts to be distributed to claimants in Category 3 and, in addition, a fee in the amount of 33⅓% of the amounts to be distributed to claimants in Category 4. If a figure of $9.50 per unit is used,[11] the fees sought by petitioners Kohn and Berger will amount to $745,733 under Category 3 and $2,291,092 under Category 4, or a total of $3,036,825. Counsel for many of the claimants included in Category 3 object strenuously to the allowance to Messrs. Kohn and Berger of any fee which would be assessed against the distributions to their clients. These attorneys likewise have contingent fee arrangements with their clients on whose behalf they have filed suit, and they point out that if an additional 16⅔% is to be deducted from the amounts to be distributed, these plaintiffs will be paying fees substantially larger than any of the other categories of claimants.

(a) The Claim Under Category 3

Petitioners Kohn and Berger quite properly have recognized that their own clients should not be charged herein with any fee in addition to the contingent fee which was agreed upon when they were engaged to prosecute the claims in question. This Court concludes that the same principle should apply to all of those claimants who are settling parties and who filed suit through counsel in this litigation. Such claimants will be paying contingent fees ranging from 20% to 33⅓% (or in a few cases even more) to their own attorneys, and any award to petitioners under Category 3 will result in even further reductions in their net recoveries. Unless the Court were to undertake to fix the contingent fees to be charged by every attorney for every claimant participating in the fund, it should not undertake to allocate to counsel for the Class Representatives any portion of the amounts to be paid under these private agreements by Category 3 claimants to their attorneys.

It would clearly be inequitable if claimants who have actually filed suit and who have contracted to pay their attorneys a contingent fee were required to pay an additional 16⅔% to petitioners Kohn and Berger. The result would be to exact a total fee of from 36% to 50% or more from the amounts to be distributed to these

[10] Petitioner Scanlon also requested that additional expenses in the amount of $21,000 be awarded as costs incurred by his clients Vincent A. Mangano and Edward S. Petros. But these plaintiffs were homeowners or owners of commercial and apartment buildings. Their suits were dismissed, and such dismissals were affirmed by the Third Circuit. See 438 F. 2d 1187-1188. Accordingly, these sums have been disallowed as expenses in this settlement.

[11] The total number of units in the settlement amount to 2,704,307.6. If the expenses allowed herein are deducted from the settlement fund of $25,955,000, the amount of the distribution per unit will be approximately $9.50 before the deduction of any fees.

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claimants. When the claimants in Category 3 are considered in relation to all the other claimants, they would be unduly and unnecessarily penalized because they undertook through attorneys of their choice to sue the defendant manufacturers. Considerations of equity permit no such result.

Indeed, petitioners Kohn and Berger recognize that it would be unfair to charge any additional fee against the claimants in Category 2, which, like Categories 1 and 3, consists of claimants who have filed suit through attorneys of their own choice. It is urged, however, that counsel for the claimants in Category 3 did not contribute to the creation of the settlement fund and in some instances even jeopardized the settlement. The facts do not support this contention. There is no doubt that petitioners Kohn and Berger were principally responsible for the settlement that was finally consummated. Nor is there any doubt, as more fully discussed hereinafter, that they should be adequately compensated for their services. But the record before the Court indicates that no settlement would have been possible without the cooperation and efforts of numerous attorneys for plaintiffs who likewise filed suit. The fact that an extremely large number of suits were filed against the defendants in many different districts necessarily helped bring about the agreement which produced the substantial settlement fund which will now be distributed to all claimants. Certainly, those claimants who undertook to incur the risk of litigation should not be penalized by being required to pay far larger attorneys' fees than any other claimant merely because their attorneys may not have, in the opinion of counsel for the Class Representatives, contributed as much to the creation of the settlement fund as did others. Moreover, petitioners Kohn and Berger would be receiving excessive fees were this Court to award them compensation under both Category 3 and Category 4.

This Court is satisfied that there should be no charge by the attorneys for the Class Representatives against any of the sums to be distributed to those claimants included in Category 3. The attorneys' fees to be paid by such litigants will be those that they agreed to pay when they engaged their attorneys. A similar approach was taken in connection with the approval of fees in the contractors' settlement. See 322 F. Supp. at 839.

(b) The Claim Under Category 4

With reference to the claimants in Category 4, petitioners Kohn and Berger seek a fee amounting to 33⅓% of the amounts to be distributed to these non-litigants. Claimants Humble Oil and Friendswood, which are included in that Category, object to the allowance of any fees to the attorneys for the Class Representatives from this portion of the settlement fund. These claimants argue that petitioners Kohn and Berger will be adequately compensated by their private contingent fee arrangements with their clients and that no additional fee whatsoever should be charged against the non-litigating claimants.

Equitable considerations do not support such an argument. Under the theory advanced by the two objecting claimants, those who did not file suit but who reaped the benefit of the litigation would receive 100% of their claim, while those who undertook the burden of the litigation would have their distributions reduced by amounts ranging from 20% to 40%. The result would be to give a free ride to those who expended the least effort. It is contended that if petitioners Kohn and Berger are paid by their own clients and likewise are awarded a fee from the amount distributable to the non-litigating claimants, they will receive a "double fee." But such is not the case. Petitioners Kohn and Berger will be receiving a part of their aggregate fee from that portion of the settlement fund distributed to their clients, pursuant to contingent fee agreements with such parties. They should receive another part of their fee as awarded by this Court, to be charged against a different portion of the fund, namely what will be distributed to the non-litigating claimants. The efforts of petitioners Kohn and Berger produced both portions of the settlement fund, and the non-litigating claimants, in accepting their share of the benefits produced, should likewise assume a share of the burden.

On behalf of claimants Humble Oil and Friendswood, it is further argued that since the application has been filed by the attorneys themselves rather than by the parties, they may not be considered by this Court under the equitable principles first espoused in *Trustees v. Greenough, supra.* It is urged that since the assessment of an attorney's fee against the portion of the settlement fund to be distributed to non-litigating claimants will not reduce the fees to be paid by the litigating claimants themselves, such application should be denied *in toto.* The law in this District is clearly otherwise.

As Judge Fullam said in *Philadelphia Electric Company v. Anaconda American Brass Company* [1969 TRADE CASES ¶ 72,892], 47 F. R. D. 557 (E. D. Pa. 1969): "And in antitrust litigation, the allocation of the recovery as between claimant and counsel should favor counsel somewhat more than in other fields as an incentive to more alert enforcement. c. f. *Dolgow v. Anderson*, 43 F. R. D. 472 (E. D. N. Y. 1968) and cases there cited." In the *Anaconda* case, the applicants were likewise Messrs. Kohn and Berger, who had petitioned for and were awarded fees to be paid directly to them as attorneys for the Class Representatives. In this litigation, similar awards have been made directly to petitioning attorneys in the wholesalers' and contractors' settlement. In *Ace Heating and Plumbing Company v. Crane Company*, the Third Circuit directed this Court to award an additional fee directly to a petitioning attorney who had contributed to the creation of the contractors' settlement. 453 F. 2d at 35. See also *Central Railroad & Banking Co. of Georgia v. Pettus*, 113 U. S. 116 (1885). This Court concludes that a reasonable attorneys' fee should be charged against the portion of the fund distributable to the non-litigating claimants and should be paid directly to the attorneys for the Class Representatives.

That petitioners Kohn and Berger are entitled to substantial fees is not disputed by any of the attorneys who sued on behalf of builder-owner plaintiffs in this litigation. Almost five and a half years ago, on December 21, 1966, petitioners Kohn and Berger filed suit on behalf of the Class Representatives, pleading a national class action on behalf of builder-owners. It was soon apparent that the litigation would be a major one and that a very large number of actions would be filed in many different districts across the country on behalf of plaintiffs at various different levels of the chain of distributoin in the industry. It was likewise apparent that the claims of certain groups of plaintiffs might well defeat those of others in view of the so-called "pass-on" issue. See *Mangano v. American Radiatpr and Standard Sanitary Corporation* [1970 TRADE CASES ¶ 73,168], 50 F. R. D. 13 (E. D. Pa. 1970), affirmed 438 F. 2d 1187 (3rd Cir. 1971), and *Philadelphia Housing Authority v. American Radiator Standard Sanitary Corporation* [1971 TRADE CASES ¶ 73,410], 323 F. Supp. 381 (E. D. Pa. 1970). Petitioners sought early to commence settlement negotiations with the defendants for a so-called "global settlement" which would dispose of all claims against the settling defendants.

Settlement discussions started early in 1967 in Philadelphia and in New York, but were postponed pending the resolution of various issues raised by the defendants. In March, 1967, defendants filed a motion seeking to stay all civil proceedings until the criminal case against them in the Western District of Pennsylvania had been concluded. On May 16, 1967, Judge Lord heard argument on such motion, which was opposed by petitioners. The motion was denied on June 7, 1967. *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation* [1967 TRADE CASES ¶ 72,139], 269 F. Supp. 540 (E. D. Pa. 1967).

Defendants then applied to Judge Rosenberg, before whom the criminal cases were pending in the Western District of Pennsylvania, seeking an injunction prohibiting further proceedings in the civil cases in Philadelphia until the criminal case was concluded. On July 28, 1967, Judge Rosenberg enjoined the plaintiffs in the civil actions from proceeding with discovery in their treble damage suits. *United States v. American Radiator and Standard Sanitary Corp.* [1967 TRADE CASES ¶ 72,199], 272 F. Supp. 691 (W. D. Pa. 1967). Petitioners and others promptly appealed to the Third Circuit, which reversed the decision of Judge Rosenberg. *United States v. American Radiator and Standard Sanitary Corp.* [1967 TRADE CASES ¶ 72,311], 388 F. 2d 201 (3rd Cir. 1967), cert. den. 390 U. S. 922 (1968).

After taking an active role in this phase of the litigation, petitioners, with all stays vacated, pushed ahead with discovery proceedings in 1968 and 1969. A motion was filed for the production of magnetic tape recordings of conversations between William E. Kramer of the Plumbing Fixture Manufacturers Association and various members and associates of that organization. In *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation* [1968 TRADE CASES ¶ 72,564], 291 F. Supp. 247 (E. D. Pa. 1968), Judge Lord held that such tapes were subject to production, reserving decision as to some of the tapes with respect to which the defendants claimed an attorney-client privilege. Subsequently, Judge Lord ordered the production of those tapes as well. 294 F. Supp. 1148 (E. D. Pa. 1969). Petitioners likewise appeared before the Judicial Panel on Multidistrict Litigation and successfully urged that all the

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plumbing fixture cases be transferred to the Eastern District of Pennsylvania under 28 U. S. C. § 1407. *In re Plumbing Fixture Cases* [1968 TRADE CASES ¶72,666], 295 F. Supp. 33 (J. P. M. L. 1968).

After participating in various other discovery proceedings, petitioners undertook to resume settlement negotiations, culminating in a meeting at the Engineers Club in New York City on October 13, 1969. At that time, a large group of plaintiffs' attorneys met with various defendants' attorneys, and an offer of $15,000,000 was made on behalf of the full-line defendants to settle all of the many suits that had been filed. Because of the divergent views expressed at that meeting by the many plaintiffs' attorneys present, nothing definite resulted from these initial discussions. However, it was generally agreed by all plaintiffs that the amount proposed would not be acceptable as a total settlement of the entire litigation.

Petitioners then undertook to keep settlement negotiations alive. Another meeting was held on October 16, 1969 in which separate groups of plaintiffs were formed, consisting of builder-owners, public bodies, contractors, wholesalers and homeowners. A meeting was next held in Mr. Kohn's office on October 29, 1969, attended by various attorneys for builder-owner plaintiffs and by counsel for three principal defendants. As the wholesalers, contractors and public body groups had indicated that they wanted to negotiate separately, petitioners discussed with defense counsel the possible settlement of the builder-owner claims only for an amount in excess of $20,000,000. Further discussions and negotiations eventually led to the $21,500,000 settlement offer made by the major defendants other than Briggs Manufacturing Company. When various plaintiffs' attorneys could not agree on either this amount or upon the terms of a formal settlement agreement, petitioners Kohn and Berger continued their discussions with defendants' counsel, leading eventually to the execution of an agreement dated February 4, 1970 between petitioners Kohn and Berger and the settling defendants. Under this agreement, the obligations of the defendants were made contingent upon satisfactory resolution of the claims of wholesalers, contractors, public bodies and the purchasers of structures. Subsequently, many other builder-owner plaintiffs agreed to the terms of this settlement.

At a later date, negotiations were conducted by petitioners with attorneys for the short-line defendants. On August 5, 1970 and November 12, 1970, agreements providing for a settlement fund in the amount of $1,400,000 were executed between petitioners Kohn and Berger and the seven short-line defendants.[12] Following settlements of the claims of the various other classes, these two agreements were formally presented to the Court for preliminary approval at the May 17, 1971 hearing.

The difficult question presented on this record is what this Court should determine to be a reasonable amount to be awarded petitioners under all the circumstances here. On the one hand, the attorneys for the Class Representatives are entitled to fair and adequate compensation for their skillful efforts in producing this sizable fund for the benefit of this large class of builder-owner claimants. On the other hand, this Court should avoid any temptation to be overly generous and should not rubber-stamp a fee application before it, no matter what may be the reputation of petitioning counsel or the degree of expertise claimed. Indeed, the applications for fees filed by the experienced plaintiffs' attorneys herein, including that of counsel for the Class Representatives, can hardly be characterized as modest and are quite obviously colored by considerations of self-interest. Only the Court is in a position to assess impartially the myriad of factors which relate to the question of the reasonableness of a fee to be paid from a class action settlement fund. An excessive allowance of attorneys' fees would reflect adversely on both the bar and the bench in the administration of class action settlements. See *Milwaukee Towne Corp. v. Loew's, Inc.*, [1950-1951 TRADE CASES] 190 F. 2d 561, 570 (7th Cir. 1951). In exercising its equitable powers, the Court, in particular, must bear in mind the interests of the absent non-litigating claimants, who are usually not represented at hearings such as the one recently held in this case.[13]

If all the factors here are weighed, it appears that petitioners have over valued their services in making the claim advanced under Category 4. This Court concludes

[12] Six of the seven short-line defendants were parties to the August 5, 1970 agreement, and the seventh short-line defendant joined in the settlement by virtue of the November 12, 1970 agreement.

[13] Humble Oil and Friendswood were the only claimants in this group represented by counsel at the hearing.

that it would not be reasonable to award petitioners a fee in the amount of 33⅓% of the portion of the fund in question. In so deciding, the Court has been guided by the following considerations:

1. In no case that has been brought to the attention of this Court have class action fees been awarded in the amount of 33⅓% of a settlement fund or of any substantial portion of such fund. On the contrary, in comparable situations, class action fees awarded by the Court have not exceeded 25% and in many instances have been less than that figure. In *Anaconda American Brass Company, supra*, the 25% fee awarded by Judge Fullam applied to only a small part of the $22,000,000 settlement fund. Most of the claimants had private agreements with counsel, and the amount actually awarded to the attorneys for the Class Representatives was some $500,000. In *State of Illinois v. Harper and Rowe Publishers, Inc.*, Civil No. 67-C-1899 in the Northern District of Illinois, Judge Decker has awarded attorneys' fees which amount to less than 20% of the total settlement funds. In the wholesalers' settlement in this litigation, a fee of 15% of the net settlement fund was allowed. In the contractors' settlement, a fee of 25% of the net settlement fund was allowed. However, sixteen different attorneys had contributed to the creation of the contractors' settlement fund, and the fee allowed was divided among them. Counsel for the Class Representatives received merely a portion, some $86,000, of the $400,000 aggregate fees awarded. In the appeal taken from the approval of the contractors' settlement, the Third Circuit, although approving the allowance of counsel fees in the amount of 25%, expressed "some concern in view of the fact that the case never went to trial." 453 F. 2d at 34.

2. Where fees are computed on the basis of a percentage of the amount of the recovery, the larger the recovery the less should be the percentage. This principle of a sliding scale has been generally recognized in fee schedules established by statute or rule and is equally applicable where a fund has been created for the benefit of many claimants. *Winkelman v. General Motors Corp.*, 48 F. Supp. 504, 506 (S. D. N. Y. 1942); Hornstein, *Legal Therapeutics: The Salvage Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658, 664 (1956).

3. Petitioners Kohn and Berger will be receiving $802,707 directly from their clients for their efforts in this litigation. It has not been suggested by any one in this case that this Court should undertake to alter in any way the private agreements which will result in the payment of these contingent fees. However, in fixing the amount of a reasonable fee to be paid petitioners from the settlement fund, the Court necessarily should consider the total amount of the compensation that they will receive for their efforts.

4. Although the time spent by the petitioners is not as important here as it might be in other cases where fees are fixed by the Court, the number of hours expended by counsel is still a factor which should be considered by the Court in awarding fees for class representation. Petitioners Kohn and Berger have spent in excess of 6,000 hours in connection with this litigation. If this Court were to approve their application as filed, including amounts they would receive directly from their clients under Category 1, they would be compensated at a rate in excess of $630 per hour. Under Category 4 alone, and assuming that all 6,000 hours were spent in earning that portion of their fee, they are seeking, at a 33⅓% figure, compensation at a rate in excess of $500. In spite of the excellent result achieved and the undisputed competence of counsel for the Class Representatives, any award under the circumstances of this case which would result in compensation at such an hourly rate would be excessive.

Balancing all of the factors here present, this Court finds and concludes that a reasonable fee to be awarded to petitioners Kohn and Berger would be 20% of the amount distributable to claimants under Category 4. At $9.50 per unit, the award made by this Court from the settlement fund will amount to $1,374,655. Petitioners will, of course, be receiving directly from their clients the additional amounts previously noted. Were the percentage figure to be applied to the entire settlement fund, it would undoubtedly be considerably less than 20%. However, under Category 4, 723,502.6 units are involved or an aggregate distribution of $6,873,275, which is some 26% of the total fund.

In deciding upon an award at a 20% figure, this Court would note that many of the factors relied upon by Judge Fullam in *Anaconda American Brass Company, supra*, are likewise present here. As reasons supporting the award in that case, Judge Fullam cited the following: (1) that the abilities and standing of petitioning counsel were very high; (2) that the results achieved were remarkably favorable to the interests

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of the class members; (3) that the enforcement of the antitrust laws in that case was solely due to the efforts of the petitioners; (4) that the treble damage feature of antitrust recoveries means that counsel can be generously paid without actual cost to the claimants in that counsel fees merely reduce a windfall; and (5) that the 25% fee had already been agreed to by virtually all the claimants. 47 F. R. D. at 559.

Petitioners Kohn and Berger were likewise petitioners in that case, and this Court would agree that the abilities and standing of these attorneys are very high. The results here have been quite favorable to the interests of the class members who will receive approximately $9.50 per unit under the settlement, before fees are deducted. The fees to be paid from the distributions to non-litigating claimants do no more than reduce amounts that can properly be characterized as windfalls in that they are being received with little effort having been expended by the distributees. The percentage allowed is less than amounts which litigating claimants have agreed to pay their own attorneys. Even though the hourly rate at a 20% figure will be considerably more than a Court might be expected to approve in another type of case, the prospect of handsome compensation must be held out as an inducement to encourage competent counsel to bring civil actions such as those here involved for the enforcement of the antitrust laws. See *Dolgow v. Anderson, supra,* at 494; *Hornstein, supra,* at 662-663. Petitioners Kohn and Berger with their extensive experience in litigation of this nature, provided the leadership which resulted in cooperation on the part of most of the attorneys for the plaintiffs in pressing towards a settlement. Because of the complexity of the competing interests of plaintiffs at various levels of distribution, no settlement would have been possible without the coordination by all the plaintiffs of their efforts. It was the skill and imagination of petitioners Kohn and Berger which accomplished such coordination and which led eventually to the favorable result achieved.

Petitioners Kohn and Berger point out that if this Court allows a lesser amount to be charged against the non-litigating claimants than that which will be paid by the litigating claimants under private fee agreements with their attorneys, then those who exerted the lesser effort will receive the greater net benefit. The point is a valid one which merits discussion. Absolute equalization between litigating and non-litigating claimants can be achieved in one of two ways. On the one hand, the Court could arbitrarily award Messrs. Kohn and Berger 33⅓% from distributions to the non-litigating claimants, thus making the rate as to them the same as what they charged their own clients.[14] But such a solution would give Messrs. Kohn and Berger more than this Court has concluded they are reasonably entitled to for the services they have rendered. Accordingly, such a means of equalizing fees is clearly unacceptable.

On the other hand, this Court might undertake to establish the rate for all contingent fee agreements between plaintiffs in this litigation and their attorneys. The contingent rate to be charged might then be set at the same rate which the Class Representatives would receive from the portion of the fund to be distributed to the non-litigating claimants. However, it is doubtful whether this Court would have the power to consider the reasonableness of private agreements entered into between a client and an attorney. Even if it did, such power could hardly be exercised in this case. No client and no attorney, who are parties to any contingent fee contract involved here, has applied to this Court to review the reasonableness of the fee agreed upon. Local practice and the circumstances under which each agreement was reached would have to be considered by the Court as to each separate fee arrangement.[15] Furthermore, the legal question that would be presented to the Court in connection with a determination whether any such agreement should be rescinded is substantially different from the one presently before the Court. For these reasons, this Court has likewise rejected this latter approach as a means of achieving absolute equalization of the attorneys' fees to be paid by all claimants.

There is already considerable disparity between the rates to be paid by litigating plaintiffs who have contingent fee agreements with their attorneys. Indeed, at a

[14] However, this rate would be more than the 20% or 25% charged by some attorneys and less than the 40% charged by a few others.

[15] Local practice in the various states would seem to vary. The percentages that have been brought to the Court's attention in the various petitions filed include 20%, 25%, 33⅓%, and even 40%. This Court expresses no view as to the propriety of any such contingent fee agreement. See American Bar Association *Code of Professional Responsibility,* EC 2-17, 2-18 and 2-20.

20% rate, the fees to be paid by the non-litigating claimants will in some instances be the same as those to be paid by some litigating claimants. As complete equalization among all claimants is not possible in any event, no substantial inequity results from the fact that the plaintiffs who contracted with Messrs. Kohn and Berger will be paying fees computed at a higher rate than those claimants who did not engage these attorneys to represent them herein. Whatever disparity there may be between the fees to be paid herein by the litigating and by the non-litigating claimants, such difference is not support for an *increase* in the 20% fee fixed herein by the Court for petitioners Kohn and Berger.

This Court would agree, however, that petitioners Kohn and Berger are entitled to charge all of their private clients a contingent fee of 33⅓% of their recovery. Most of their clients, who are responsible builder-owners, have agreed upon such a figure. Presumably the figure is an acceptable one in the Philadelphia area for clients dealing with Messrs. Kohn and Berger, and this Court will therefore approve a similar charge to petitioners' other private clients. As mentioned hereinabove, the test for determining what is a proper contingent fee to be charged a private client is entirely different from the test for determining what is a reasonable fee for class representation in a class action settlement.

IV

The Claims of the Other Petitioning Attorneys

Petitioners Kohn and Berger, and the attorneys for a number of other plaintiffs, object to any allowances from the settlement fund for any attorney other than counsel for the Class Representatives. Messrs. Kohn and Berger claim that the settlement resulted almost entirely from their efforts and that other attorneys for plaintiffs should receive compensation for their small contribution to the settlement fund only under their private fee agreements with their clients.

This Court has concluded that none of these twelve petitioning attorneys should be awarded a fee by the Court to be charged against distributions to the non-litigating claimants. All but one of them will receive fees from their clients for their services in this litigation. The out-of-pocket expenses of litigation of each has been allowed, insofar as such expenditures were made on behalf of the claims of builder-owners. In the contractors' settlement, this Court did award a fee to an attorney other than counsel for the Class Representatives. 322 F. Supp. 839-840. However, Morton Hamburg, the attorney in question, was head of the ad hoc contractors' committee from October, 1969 until March 1, 1970 and conducted the settlement negotiations until that latter date when Mr. Sullivan assumed the leadership on behalf of the settling plaintiffs. Mr. Hamburg was awarded a $5,000 fee from the contractors' settlement fund for the leadership he provided at this early stage of the negotiations.

Insofar as the builder-owner settlement is concerned, it is not disputed that petitioners Kohn and Berger provided the leadership for the class from beginning to end. Whatever contribution others made to the creation of the fund was minor when compared to that of Messrs. Kohn and Berger. As discussed more fully hereinbelow, each such petitioning attorney has been adequately compensated by fees to be paid him by his clients, or for other reasons is not entitled to an award from the Court.

1. *Applications of Messrs. Burke, Downs, Harris and Steinhardt*

Each of these four attorneys seeks fees from the settlement fund only if this Court concludes that an attorney or attorneys other than counsel for the Class Representatives should be compensated from the fund. Each of these four then is satisfied that they will be adequately compensated for any contribution they made to the creation of the settlement fund by the payment of fees by their clients.[16] For, the reasons hereinafter stated, the Court has concluded that no one other than Messrs. Kohn and Berger should be awarded fees from the settlement fund. It is therefore not necessary to consider the applications of Messrs. Burke, Downs, Harris and Steinhardt.

2. *Joint Application of John Cochrane and Floyd E. Boline*

Messrs. Cochrane and Boline have filed a joint application seeking fees in the amount of $116,000. They are counsel of record in three cases filed in the District of Minnesota. From this Court's knowledge

[16] Many other plaintiffs' attorneys, who contributed to the settlement to the same slight extent as did the twelve petitioners in question, were satisfied with their private fee arrangements and have commendably refrained from seeking an award from the settlement fund.

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of these proceedings, it is clear that most of the efforts of these two attorneys have been directed towards prosecution of the contractor cases. They have elected to exclude their contractor clients from the contractor settlement and are proceeding with the litigation against all the defendants.

These applicants have contingent fee agreements with their builder-owner clients which will result in their receiving some $31,000 in fees. Any payment made to them from the settlement fund will result in the reduction of the amount of the fees to be paid by their clients. Therefore, if this Court were to award these attorneys fees in the amount of $31,000 or more, the claimants represented by Messrs. Cochrane and Boline would, unlike all the other claimants herein, receive a distribution undiminished by any fee. In view of all of these circumstances, this Court is satisfied that Messrs. Cochrane and Boline are not entitled to a fee to be charged against the non-litigating claimants. They will receive adequate compensation for whatever small contribution they made to the creation of the builder-owner settlement fund under their private fee agreements.

3. *Application of Paul R. Connally*

Mr. Connally seeks no specified amount but merely asks this Court to award him a reasonable fee from the settlement fund. His argument in support of his application related primarily to his opposition to the assessment by petitioners Kohn and Berger of a 16⅔% fee against distributions to his clients and to his claim that his clients' expenses of litigation should be paid from the settlement fund. For the reasons stated hereinabove, this Court has agreed with both of these contentions.

Mr. Connally filed three different suits in the District of Columbia, the first of which was instituted on October 31, 1967. He represents builder-owner claimants under various different contingent fee agreements which would result in the payment to him of net fees in excess of $240,000. This Court is satisfied that Mr. Connally will be adequately compensated for his services in contributing to the creation of the settlement fund by fees paid directly to him by his clients. For these reasons, no award will be made to him from the settlement fund.

4. *Application of C. Carleton Frederici*

Mr. Frederici has filed an application herein seeking fees in the amount of $17,646. He filed two suits in the Southern District of Iowa, one on October 15, 1969 on behalf of builder-owners, and the other on June 5, 1969 on behalf of plumbing and other contractors. He was present at several settlement conferences and participated in the taking of depostions.

Like Mr. Cochrane, Mr. Frederici's clients have opted out of the contractor settlement and are continuing the litigation against the defendants. The record here indicates that his efforts have been devoted mainly towards prosecution of his contractor case, and he would appear to be entitled to receive the major part of his compensation from any recovery effected therein. Mr. Frederici's agreement with his builder-owner clients will result in the payment to him of fees of some $2,940. Like Mr. Cochrane, if this Court were to award him fees in that amount, he has agreed to credit such sum against the fees to be paid by his clients, a result which would relieve his clients from any requirement that they pay any fees from the amounts distributed to them under the settlement. Under all these circumstances, this Court concludes that Mr. Frederici will be adequately compensated for the slight contribution that he made to the creation of the settlement fund by the fees received from his own clients.

5. *Application of Mark I. Harrison*

This applicant seeks a fee of $6,745. Even his own appraisal of his contribution to the builder-owner settlement indicates that at best it was minimal. Mr. Harrison has devoted substantially all of his time to claims asserted on behalf of public bodies. He estimates that the time he has spent on behalf of builder-owners is no more than 6% of his total time in this litigation.

Mr. Harrison was attorney for the State of Arizona and other public bodies in that State, and he appeared at a hearing in this Court to oppose unsuccessfully motions for summary judgment filed by the defendants in connection with the claims of those plaintiffs. *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation* [1971 TRADE CASES ¶ 73,410], 323 F. Supp. 381 (E. D. Pa. 1970). His motion for reargument was denied on January 27, 1971. Mr. Harrison, who represents 1,029 units, has no agreement with any of his builder-owner clients for the payment of any fees as a result of distributions to them. However, he is entitled to receive

fees for recoveries made on behalf of his public body clients. Negotiations are continuing with reference to a settlement of these claims, but to date no final settlement has been presented to the Court. This Court concludes that Mr. Harrison's contribution to the builder-owner settlement was so minimal that he is not entitled to receive a fee from this settlement fund.

6. *Application of Mitchell A. Kramer*

Mr. Kramer seeks a fee in the amount of $7,537 from the settlement fund. He expects to receive $5,900 from his clients under private contingent fee agreements with them. As in the cases of Messrs. Cochrane and Frederici, his clients rather than he will benefit from any award made by this Court up to the amount of $5,900.

Mr. Kramer is counsel of record in several suits filed in this District, the earliest of which was filed on December 24, 1969. This Court concludes that he will be adequately compensated for any slight contribution he made to the creation of the settlement fund by the fees his clients have agreed to pay him.

7. *Application of Paul D. Scanlon*

In requesting a fee in the amount of $627,600, this applicant seeks an award more than six times greater than that sought by any petitioning attorney other than counsel for the Class Representatives. Quite clearly, the record here lends no support for such an excessive request.

Most of Mr. Scanlon's clients were homeowners, commercial building owners and apartment building owners who do not qualify as builder-owners under the terms of this settlement. The efforts undertaken by him in this litigation were directed principally towards the interests of those clients. Defendants' motions to dismiss actions brought by Mr. Scanlon on behalf of these claimants were granted by Judge Lord. *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation* [1970 TRADE CASES ¶ 73,168], 50 F. R. D. 13 (E. D. Pa. 1970). After arguing and losing before Judge Lord, Mr. Scanlon argued and lost the appeal. *Mangano v. American Radiator and Standard Sanitary Corp.* [1971 TRADE CASES ¶ 73,477], 438 F. 2d 1187 (3rd Cir. 1971). He suggests that these decisions greatly benefited the builder-owner class. This is undoubtedly so, but Mr. Scanlon is hardly entitled to be paid from this settlement fund for these losing efforts undertaken for other claimants. Had he been successful on behalf of his homeowner and other clients, recoveries by builder-owner claimants would have been seriously jeopardized. His application in the main is no more than an attempt to be compensated for his unsuccessful efforts expended on behalf of claimants not involved in this settlement.

In support of his application, Mr. Scanlon claims that he made a substantial contribution to this settlement because of his part in taking the deposition of William E. Kramer of the Plumbing Fixture Manufacturers Association. The Kramer deposition commenced on January 19, 1970, which was after the date that the draft agreement of the proposed settlement with the full-line defendants was prepared and circulated. Such deposition was not concluded until March of 1970, more than a month after the date of the execution of such settlement agreement. Various plaintiffs' counsel participated in the taking of this deposition, but Mr. Scanlon accounted for some 70% of the examination of the witness Kramer by attorneys for the plaintiffs. At the time of the deposition, his homeowner and other cases were still pending. Even if it were assumed that he was appearing on behalf of his builder-owner clients, the record of the deposition proceedings indicates that much of the time he spent was not only wasted but was in fact counter-productive insofar as the interests of builder-owner plaintiffs were concerned.

Mr. Scanlon represents builder-owner claimants whose claims amount to 10,174 units. This Court has awarded him herein that portion of the expenses he has claimed which are reasonably related to this particular settlement. In addition, defendants have paid him $25,000 to cover his expenses in the *Mangano* case in return for his agreement not to seek certiorari. Mr. Scanlon has contingent fee agreements with his clients which will result in the receipt by him of fees amounting to some $19,000. He will be adequately compensated for whatever minor contribution he may have made on behalf of builder-owner clients to the creation of this settlement fund by such direct fees to be paid him.

8. *Application of Lawrence Walner*

Mr. Walner has filed an application seeking fees in the amount of $30,500 from this settlement fund. He also represents various contractors in this litigation and was awarded a fee of $3,000 by the Third Cir-

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cuit from the contractors' settlement fund. 438 F. 2d at 35. Mr. Walner responded to this Court's letter of March 14, 1972 requesting further details but did not furnish the Court with the number of units he represented nor the amount of the fees he will be receiving directly from his builder-owner clients. Apparently, it is disputed that he in fact represents several claimants who will receive distributions from this settlement fund. Mr. Walner did not appear at the hearing on April 7, 1972 to support his application.

Mr. Walner has filed four suits in this litigation, only one of which was brought on behalf of builder-owner plaintiffs. He is proceeding with the litigation on behalf of several of his contractor clients. He claims that he contributed to this settlement by unsuccessfully challenging the contractors' settlement. See 438 F. 2d 30.

Like Mr. Scanlon, Mr. Walner is not entitled to be compensated from this fund for a losing effort on behalf of contractor clients. He is entitled to receive contingent fees from his builder-owner clients amounting to one-third of the amount of the distributions to them. Although he has failed to furnish the Court with the actual amounts involved, it would appear that he will be adequately compensated for any small contribution he made to this settlement under these private fee agreements. For these reasons, his application is denied.

V

Conclusion

For the reasons stated, the pending applications for fees and expenses are granted in part and denied in part. This Court's findings of fact and conclusions of law under Rule 52(a) of the Federal Rules of Civil Procedure are embodied in the aforegoing opinion, whether or not expressly so characterized. Counsel for the Class Representatives are directed to submit an appropriate Order prepared in accordance with the findings and conclusions herein made.

[¶ 75,361] Lindy Bros. Builders, Inc. of Philadelphia, et al. v. American Radiator & Standard Sanitary Corp., et al.

U. S. District Court, Eastern District of Pennsylvania. Civil Action No. 41774. Filed September 25, 1974.

Sherman Act

Class Actions—Settlements—Attorneys' Fees—Standards for Award—Allocation Among Claimants.—In accordance with an appellate court decision (1973-2 TRADE CASES ¶ 74,761) remanding for further consideration an award of attorneys' fees in settled class litigation, the district court permitted further discovery and held formal pre-trial conferences and an evidentiary hearing. Considering factors of time spent, a reasonable hourly rate, contingency, quality of work, and the amount of recovery, the district court arrived at the amount of the award. Although the contingency and quality factors required that the award, if based solely on time spent at a reasonable rate, be doubled, such an increase was not appropriate for all services rendered by the attorneys, namely, the time spent on the fee petitions, time spent by paraprofessionals and law students, and future time. The total award, so determined, amounted to 3.9 percent of the total settlement fund. Furthermore, claimants unrepresented by the attorneys were required to pay, contrary to the ordinary rule, a larger percentage of the awarded fee than their percentage share of the total recovery. Represented claimants had agreed to pay 33⅓ percent of their recovery, and it had been ruled earlier that they should not have to pay more. Allocation on the basis urged by the nonrepresented claimants would have meant that represented claimants would have paid over eight times as much as they in fees. These circumstances caused the court to exercise its equitable powers to spread the total cost more fairly among the members of the class. Unrepresented claimants were ordered to pay an amount equal to somewhat less than 12 percent of their recovery. See ¶ 9032, 9320.

For petitioners: Harold E. Kohn, David Berger, Aaron M. Fine, H. Laddie Montague, Jr., and Harold E. Kohn, P. A., and David Berger, P. A., Philadelphia, Pa. **For claimants:** William Simon, G. Joseph King and Howrey, Simon, Baker & Murchison, Washington, D. C., for Humble Oil & Refining Co., and Friendswood Development Co.

[Opinion]

HARVEY, D. J.: In *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp.* [1973-2 TRADE CASES ¶ 74,761], 487 F. 2d 161 (3d Cir. 1973), the United States Court of Appeals for the Third Circuit remanded certain matters in this multidistrict antitrust litigation to this Court for further proceedings. That opinion dealt with two separate appeals relating to the award of attorneys' fees by this Court following the final approval of a settlement of the claims of members of a national class of builder-owners against manufacturers of plumbing fixtures. Friendswood Development Company (Friendswood) and Humble Oil & Refining Company (Humble) appealed from the award by this Court of fees to attorneys Harold E. Kohn and David Berger and their law firms,[1] and attorneys of the firm of Thoma, Schoenthal, Davis, Hockenberg & Wine appealed from this

[14] Their special demurrers and motions to strike went "off calendar" and remain to be ruled on by the trial court. At least two of these special demurrers address an issue on which we have not commented, because the parties have not argued it: the standing of the plaintiff corporation—as distinguished from the plaintiff partnership—as a plaintiff seeking damages. (See § 17070.)

[1] Friendswood and Humble had not filed suit against the defendants but have duly filed claims permitting them to share in the distribution of the settlement fund.

at by the courts in the future is—that probably those that did not hire their own lawyer and just came in to participate in the class action at the end probably profited better than those that bore the heat of battle. I think that's a big problem for courts in continuing class action suits." [30]

In considering whether attorneys' fees are recoverable in a Miller Act case, the Supreme Court recently observed that the federal judiciary has recognized several exceptions to the general principle that each party should bear the costs of its own legal representation. *F. D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co.*, — U. S. — (May 28, 1974). At page — of its opinion, the Court said this:

"[W]e have long recognized that attorneys' fees may be awarded to a successful party * * * where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefitted class. The lower courts have also applied a rationale for fee shifting based on the premise that the expense of litigation may often be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important public policies." (Footnotes omitted.)

In this Court's opinion, the inequities discussed herein amount to extraordinary circumstances under the present posture of the case. Thus, this is not a case in which the unrepresented claimants should pay a percentage of the total award equal to their percentage of the total recovery. Instead, this Court will undertake in the exercise of its equitable powers to shift the fees so as to spread the total cost more fairly among the members of the benefitted class.

A fair and reasonable approach to the problems of allocation in this case would first suggest that the unrepresented claimants should not have to pay that part of the award (18.4%) that is attributable, on a proportionate basis, to the recoveries by those litigants represented by petitioners. Under their contingent fee agreements, petitioners will be receiving fees amounting to some $861,000 from these litigating claimants. Even though such agreements were privately negotiated and had no reference to any other factor besides the amount of the recovery, the fees paid thereunder, and nothing more, may be deemed reasonable compensation for the time and effort expended by petitioners in producing the $5,391,200 to be distributed to their clients under Category 1. The unrepresented claimants should not have to pay for that portion of the total benefit which was conferred on petitioner's own clients and for which petitioners will be adequately compensated under their private agreements.

However, this Court concludes that equitable considerations do require that all of the remainder of the award (or 81.6% of the amount found to be reasonable compensation) should be paid by the unrepresented claimants. The objectors concede that 27.8% of the fee awarded should be paid by the unrepresented claimants. They vigorously oppose payment of any part of the remainder which they argue is not properly allocable to them.[31]

In its earlier opinion, this Court found that the efforts of attorneys representing litigants in Category 2 did in fact contribute to the creation of the settlement fund. On the record here, this Court would reaffirm its previous finding that "no settlement would have been possible without the cooperation and efforts of numerous attorneys for plaintiffs who likewise filed suit." 341 F. Supp. at 1086. Thus, these other attorneys conferred a benefit on the unrepresented claimants for which they would ordinarily be entitled to receive compensation. When these matters were previously before the Court, no shifting of fees was necessary between Categories 2 and 3 (as now constituted), in view of the Court's approach to the problem of allocation.[32] See 341 F. Supp. at 1091-1092. Under this Court's previous ruling, litigants in Category 1 would have been paying some 33⅓% of their recoveries as attorneys' fees, litigants in Category 2, 20% to 40%, and claimants in Category 3, 20%. Although noting the different results achieved, this Court found that no substantial inequity resulted since complete equalization among all claimants was not possible in any event. 341 F. Supp. at 1092. No part of the total award sought by petitioners was previously allocated against the litigants in Category 2 for two reasons, first because this Court had concluded that an adequate award for petitioners (in addition to what they would

[30] Mr. Connolly went so far as to suggest that the unrepresented claimants, those "who came in after the job was done," should bear more of the expense of the litigation than those who had been named the plaintiffs.

[31] The amount in dispute is 53.8% of the award made herein, or some $610,503.81.

[32] As noted hereinabove, there were four categories of claimants discussed in the earlier opinion, but these have now been reduced to three.

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totaling 497,254.4 units, or 18.4% of the total fund;

2. The claims of those litigants represented by counsel other than petitioners Kohn and Berger, totaling 1,455,916.2 units, or 53.8% of the total fund; and

3. The claims of the unrepresented claimants, including those of the objectors, totaling 751,158.4 units, or 27.8% of the total fund.

Therefore, the distributions of the fund will be approximately $5,391,200 to claimants in Category 1; $15,763,400 to claimants in Category 2; and $8,145,400 to claimants in Category 3.

This Court has found that petitioners are entitled to an award of $1,134,765.45, representing reasonable compensation for the creation of a settlement fund to be distributed among all claimants. Relying on the Third Circuit's opinion in remanding this case, the objectors contend that the portion of the fee to be paid by them should be 27.8% of the total award, a sum which would amount to $315,464.80 under the determinations which this Court has made herein.[28]

Obvious and glaring inequities result from such an approach. If the unrepresented claimants were required to pay only 27.8% of the fee awarded herein, the amount to be deducted from each unrepresented claimant's recovery as attorneys' fees would be less than 4% of the sum distributed. The litigants represented by petitioners and by other counsel would thus be paying over eight times as much in attorneys' fees, and even more if any portion of this award were allocated against them. The litigants represented by petitioners have agreed to pay contingent fees amounting to 33⅓% of the amount recovered. Similarly, the other litigants have entered into agreements with their attorneys providing for the payment of contingent fees in amounts ranging from 20% to 40%.[29]

Furthermore, if the unrepresented claimants pay only 27.8% of the award, who will be responsible for payment of the balance of the fee that petitioners have earned for their productive efforts in this case? In their original application, petitioners quite properly recognized that no additional fees should be charged against their clients, who will be paying petitioners $861,191 under the contingent fee agreements in effect. Moreover, this Court has previously ruled that none of the other litigants should be required to pay any additional fees beyond what they have agreed to pay their own attorneys in this litigation. No appeal was taken from that ruling which has now become final. Thus, this Court could hardly now allocate a percentage of the total fee against the litigants in Category 2 who have not been given an opportunity to be heard in connection with the suggestion that they now be charged with a proportionate part of this award. And if no part of the award is allocated against litigants in Categories 1 and 2 and only 27.8% of the award is allocated against the unrepresented claimants in Category 3, then petitioners will not be receiving substantial portions of the fee which this Court has found to have been earned.

It would indeed be an unfair result if this Court in the exercise of its equitable powers were to administer this fund in such a way that those who assumed the risk and expense of this litigation at the outset were now required to pay attorneys' fees at least eight times as large as those unrepresented claimants who played no part in the creation of the fund and who did no more than file a claim herein in order to become entitled to payment. If fees are allocated in the manner suggested by the objectors, those who expended the least effort would benefit the most. See 341 F. Supp. at 1086. Prospective litigants, like attorneys, must have some incentive for furthering the public interest by pursuing antitrust actions as private attorneys general. See *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.* [1973-1 TRADE CASES ¶ 74,593], 481 F. 2d 1045, 1050 (2d Cir. 1973). If court rulings make it apparent that active litigants must expect to pay as fees substantially more of a percentage of their recoveries than nonlitigating claimants, potential plaintiffs will be discouraged from assuming the risks and burdens of such class action litigation and will sit on the sidelines waiting for someone else to file suit.

The unfairness of such a result was recognized by the objectors' own witness, Mr. Connolly, who testified as follows:

"Probably the greatest inequity is—and I think one that has to be looked

[28] In their briefs and arguments, the objectors have used the figure of 26%. However, the detailed figures that have now been supplied indicate that this percentage should properly be 27.8%.

[29] The problem of equalizing fees among all claimants was previously discussed by this Court in its earlier opinion. 341 F. Supp. at 1091-1092.

discussed hereinabove. A breakdown of the final award is therefore as follows:

Categories Increased	Total
Pleadings	$ 14,410.00
Discovery	271,049.00
Court Appearances	120,880.00
Settlement	107,115.00
Interventions	26,170.00
Settlement Administration	122,437.50
Briefs and Legal Research	82,699.00
General Matters	301,170.70
Other Appellate Proceedings	3,500.00
Sub-total	$1,049,431.20
Categories Not Increased	
Fee Application and Appeal	$ 29,806.25
Paraprofessional and Law Students	4,874.00
Time Spent Since March 20, 1974	40,654.00
Future Time	10,000.00
Sub-total	$ 85,334.25
Total Award	$1,134,765.45

Under such an award, petitioners Kohn and Berger will be compensated for much of their time at a rate of $250 per hour, for much of Mr. Fine's time at $200 per hour and for much of the time of other attorneys in their firms at $70-$140 per hour.

Such hourly rates are reasonable under all the circumstances of this case and are even less than those rates applied in other class action litigation. In *Arenson v. Board of Trade of City of Chicago* [1974-1 TRADE CASES ¶ 74,953], 372 F. Supp. 1349, 1359 (N. D. Ill. 1974), Judge Bauer recently awarded fees in an antitrust case to various attorneys following settlement of a class action, including awards to Mr. Fine at $400 per hour and to Mr. Kohn at $500 per hour. In multidistrict litigation involving the gasoline industry, fees of over $500 per hour for the time of all counsel were recently awarded by Judge Augelli. See Order in *City of Philadelphia v. American Oil Company* [1971 TRADE CASES ¶ 73,625], 53 F. R. D. 45 (D. N. J. 1971). In *City of Philadelphia v. Chas. Pfizer & Co.* [1972 TRADE CASES ¶ 74,033], 345 F. Supp. 454, 485 (S. D. N. Y. 1972), Judge Wyatt, although criticizing what he deemed to be unnecessary interventions in that case, still awarded petitioners Kohn and Berger fees which amounted to $200 per hour for the time spent by every attorney in the two firms who worked on the case, without regard to his or her status as a senior partner, junior partner or associate. In *Donson Stores, Inc. v. American Bakeries Co.* [1973-2 TRADE CASES ¶ 74,691], 60 F. R. D. 417, 420 (S. D. N. Y. 1973), the Court awarded fees that averaged $200 an hour for all attorneys in a "relatively uncomplicated case which was pioneered by the Government. * * *"

It should also be noted that the total award in this case represents only some 3.9% of the total fund of $29,300,000. Such a percentage is substantially less than amounts awarded in similar cases. In *Goldstein v. Alodex, supra,* Judge Broderick listed fee awards in twelve recent cases. The percentages ranged from 19% to 30% of the recoveries, except for the award in *In Re Four Seasons Securities Laws Litigation, supra.* In that case, Judge Thomsen made awards aggregating only some 10% of the amount recovered, finding that the result achieved was "modest" and that some of the services rendered had not been of benefit to the classes. 59 F. R. D. at 665-666.

Of course, petitioners will in addition receive from their own clients some $861,000 in fees. But even if they received all of those amounts as well as the entire award made herein, the aggregate fees paid to them would still be less than 7% of the total recovery in this case.

V

Allocation

Having determined the total reasonable value of petitioners' services to the entire class, this Court must next decide what portion of the amount arrived at should be paid by the unrepresented claimants. Ordinarily and absent extraordinary circumstances, the unrepresented claimants should pay a percentage of the reasonable value of attorneys' services to the class equal to the percentage of the class' recovery. 487 F. 2d at 169.

For purposes of making such determination in this case, the entire settlement fund must be divided into three separate categories.[27] The corrected total number of units in the settlement (excluding claims against Celotex only) is now 2,704,329. The three categories of the settlement fund are as follows:

1. The claims of those litigants represented by petitioners Kohn and Berger,

[27] In their original application, petitioners divided the fund into four separate categories. However, in its earlier opinion in this case, this Court found that suggested categories 2 and 3 should be treated alike. See 341 F. Supp. at 1085-1086. Thus, the portion of the fund to be distributed to claimants represented by attorneys other than petitioners will now be treated as one category, not as two.

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presented to the Court on April 7, 1972 for final approval. In approving the settlement following that hearing, this Court made the following observation:

> "It is certainly unusual in a settlement of this size, with as many attorneys as we have had involved in it, and as many claimants, that there has been only one objection noted here today."

The objectors' witness, Mr. Connolly, testified that this was a "good" settlement and that his clients were very happy about it.[22] He further testified to the extraordinary accuracy of Mr. Kohn's preliminary estimate that the proposed settlement would amount to approximately $10 per bathroom unit.

The objectors, in claiming that the settlement achieved in this case was an unremarkable one, rely on certain statements made during earlier proceedings in this case by Mr. Samuel Seymour, an attorney in Mr. Connolly's office. But Mr. Seymour did not testify at the evidentiary hearing that was held following remand, nor was he deposed before the hearing. Mr. Connolly had no personal knowledge of the basis for these statements, and no weight can be given to what Mr. Seymour said as an advocate while representing clients in earlier proceedings in this case.

From the evidence presented, this Court concludes that petitioners, in the face of determined opposition by experienced adversaries representing the defendants, were able to achieve a result very favorable to the entire class.

IV

The Award

Petitioners contend that this Court should make an award to them in the amount of 20% of the portion of the fund distributable to the unrepresented claimants, or some $1,629,000. The objectors assert that the total award should be $299,900 and that the unrepresented claimants should be required to pay only their proportionate share, or some $78,000.[23]

This Court interprets the Third Circuit's opinion in *Lindy Bros.* as prohibiting a percentage award in a case of this sort.[24] The standards and procedures which now govern in this Circuit[25] require an initial determination based solely on the time spent and a final determination reflecting "at least" the two additional factors previously discussed. 487 F. 2d at 168. The latter two factors give the trial court the needed flexibility to tailor an award to the actual performance of counsel. *Merola v. Atlantic Richfield Co.* [1974-1 TRADE CASES ¶ 74,957], 493 F. 2d 292, 298 (3d Cir. 1974).

In concluding that the contingency factor and the quality factor require an increase in the amount of the initial determination here, this Court finds that such increase should not automatically be applied to every type of services rendered. Compensation for services performed by petitioners in connection with the preparation and presentation of their fee petitions in this Court and on appeal will be adequate at the hourly rate previously determined to be reasonable. Time spent by paraprofessionals and law students will be similarly treated,[26] as will the time spent since March 20, 1974, all of which related to fee matters. Finally, this Court concludes that compensation for future time, based on the estimate that this Court has found to be reasonable, should not be increased because of the aforementioned additional factors.

With the exception of these items, this Court finds and concludes that all the other amounts determined on the basis of a reasonable hourly rate should be doubled because of the contingency and quality factors

[22] Later in his testimony, Mr. Connolly agreed with the characterization suggested by objectors' counsel that the settlement was "acceptable but not exceptional." From a reading of his deposition in its entirety, this Court will give full credit to that portion of Mr. Connolly's testimony in which he described the settlement as a "good" one.

[23] Petitioners question the motives of the objectors in opposing all but minimal fees for them as attorneys for the class representatives. Friendswood and Humble are subsidiaries of Exxon Corporation, which is frequently a defendant in class action litigation. Counsel for the objectors has written an article characterizing the class action device as "an engine of destruction". *Class Actions—Useful Tool or Engine of Destruction,* 55 F. R. D. 375 (1972). Petitioners suggest that the objectors here seek to limit class fees so as to discourage the prosecution of class actions by the ablest and most experienced plaintiffs' attorneys.

[24] Of course, after the amount of a fee has been determined, a court may wish to test its reasonableness by computing the percentage of the entire fund awarded as a fee and comparing the resulting figure with those in similar cases.

[25] The *Lindy Bros.* opinion has become a leading case on the subject of class action fees and has within a very short period of time been followed in other jurisdictions. *City of Detroit v. Grinnell Corp., supra; Liebman v. J. W. Peterson Coal & Oil Co.* [1974-1 TRADE CASES ¶ 75,117], — F. Supp. — (N. D. Ill. 1974).

[26] Petitioners are entitled to be reimbursed for the cost of their paraprofessional help but no more. *City of Detroit v. Grinnell Corp., supra* at 473.

can Brass Co., supra, and to petitioner Berger's participation in the rock salt litigation, *City of Philadelphia v. Morton Salt Co., supra,* and in the case of *Professional Adjusting Systems of America, Inc. v. General Adjusting Bureau, Inc., supra.*[20]

In *City of Philadelphia v. Chas. Pfizer & Co.* [1972 TRADE CASES ¶ 74,033], 345 F. Supp. 454, 484-485 (S. D. N. Y. 1972), Judge Wyatt noted that "Kohn is accepted as an able and experienced antitrust specialist who has a high standing at the bar." Judge Broderick, in a Memorandum and Order filed on December 7, 1973, in *Goldstein v. Alodex,* Civil No. 71-1857 (E. D. Pa.), said that the "standing of the Harold E. Kohn firm in class action litigation is well known and need not be extensively detailed herein." Mr. Connolly testified that petitioner Kohn was "a very, very able class antitrust lawyer" and "a lawyer of national reputation."

Petitioners Kohn and Berger and various members of their firms have filed many briefs and pleadings which have been reviewed by the undersigned judge and have personally appeared before the undersigned on many occasions since June of 1970. The record here also includes various pleadings, briefs and memoranda filed before that date. From a review of these written materials and from personal observations, this Court concludes that petitioners have exhibited an unusual degree of skill in conducting these proceedings. They were aggressive and imaginative throughout. Because the work has been efficient and of an atypical quality, the aggregate hourly compensation should be increased. Indeed, the total amount of time spent by petitioners in this case is relatively low when one considers what was accomplished and the number of years that have elapsed since the litigation was commenced. Certainly, economy of effort should not be penalized. Less experienced and less skillful attorneys would undoubtedly have expended much more time in achieving the same result than did petitioners.

(c) *The Amount of the Recovery*

Antitrust settlements are traditionally based on an estimate of single damages only. *City of Detroit v. Grinnell Corp.* [1974-1 TRADE CASES ¶ 74,986], 495 F. 2d 448 (2d Cir. 1974). The $29,300,000 fund in this case amounts to approximately $10.75 for a single bathroom unit for the full four-year period covered by the indictment filed by the government against the full-line defendants. As previously discussed, the evidence offered by the government at the trial of the criminal case covered only a nine-month period from September 1962 through July 1963. Defendants' published prices for high volume popular fixtures showed increases that varied from $3.07 to $4.57. Thus, the recovery per unit was from two to three times the actual price increase.

The total amount of the fund in the contractor settlement was some $2,400,000, while in the wholesale settlement the fund amounted to some $1,100,000. There were of course many more litigants and claimants involved in the builder-owner settlement, but even so, the $29,300,000 fund created by petitioners' efforts averaged out to a much larger per unit figure than in the other two settlements.

One of the reasons that the settlement fund now amounts to over $29,000,000 is that petitioners insisted that defendants agree to pay interest on the amounts to be contributed. Because of notice requirements and the size and complexity of the litigation, it appeared that several years might pass before the various settlements could be finally approved by the Court and the final judgments entered. The full-line settlement agreement required the payment of interest from April 1, 1970 and the short-line agreement from September 1, 1970. The final judgment approving those settlements was not entered until May 17, 1972. A similar provision as to interest was included in the Celotex settlement agreement.[21] All claimants have benefitted substantially from petitioners' foresight in insisting upon these provisions which at the time were novel in class action settlements of this kind.

That the original settlement was a most favorable one is indicated by the fact that only one attorney opposed it when it was

[20] More recently petitioner Kohn successfully tried the class action of *Kohn v. American Metal Climax, Inc.,* 458 F. 2d 255 (3d Cir.), cert. den. 409 U. S. 874 (1972), and Mr. Fine successfully tried the class action in *Gould v. American Hawaiian Steamship Co.,* 362 F. Supp. 771 (D. Del. 1973). Although petitioners' participations in these trials occurred after the settlements were achieved in this case, they illustrate that petitioners, with their extensive experience in similar matters, would not hesitate to proceed to trial in complex class actions in which a favorable settlement could not be reached, a fact known to defendants when they settled these cases.

[21] Over $3,100,000 of pre-judgment interest has been added to the fund since the settlements were agreed upon.

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attorneys, with outstanding academic records. Members of their firms were likewise highly competent practitioners.

Petitioner Kohn was a 1934 Phi Beta Kappa graduate of the University of Pennsylvania. He received an LL.B. from that University's law school in 1937 and was first in his class, a member of the Order of the Coif and an editor of the Law Review. When this litigation commenced, petitioner Kohn was a senior member of the Philadelphia law firm of Dilworth, Paxson, Kalish, Kohn and Levy. In July 1969, he and other attorneys who had been associated with the Dilworth firm formed the professional association of Harold E. Kohn, P.A. Petitioner Kohn is a member of various bar associations and is a Fellow in the International Academy of Trial Lawyers. He is a member of the Special Committee of the American Bar Association on Multidistrict and Protracted Litigation and has lectured frequently for the American Bar Association and other groups on class and antitrust litigation.

Petitioner Berger was a 1932 honors graduate of the University of Pennsylvania. In 1936, he received an LL.B. from that University's law school where he was a member of the Order of the Coif and an editor of the Law Review. He was a senior partner in the firm of Cohen, Shapiro, Berger, Polisher and Cohen until he left in 1970 and formed the professional association of David Berger, P.A. Petitioner Berger is likewise a member of various bar associations and was Chancellor of the Philadelphia Bar Association in 1963. He was City Solicitor of the City of Philadelphia from 1956 until 1963. He has served since 1965 as a member of the United States Supreme Court Advisory Committee on the Federal Rules of Evidence.

A stockholder and officer of Harold E. Kohn, P.A., Aaron M. Fine, who has been particularly active in this litigation, is a 1943 Phi Beta Kappa graduate of the University of Pennsylvania. He received an LL.B. from that University's law school in 1948, was second in his class, a member of the Order of the Coif and an editor of the Law Review. He became a member of the Dilworth firm in 1955. He has lectured on class actions for the American Bar Association and has been on various class action panels of the Practicing Law Institute and of the Ninth Circuit Judicial Conference. Within the past year, Mr. Fine argued before the Supreme Court the leading class action case of *Eisen v. Carlisle and Jacquelin, supra.*

Herbert B. Newberg was a partner at Cohen, Shapiro, Berger, Polisher and Cohen until he left that firm to join the Berger firm in 1970. Mr. Newberg was a 1958 graduate of the University of Pennsylvania Wharton School and was first in his class. He received his law degree from Harvard Law School in 1961 and was an Assistant City Solicitor of the City of Philadelphia from 1962 until 1964, when he joined Mr. Berger in the practice of law.

Other attorneys in the Kohn firm and in the Berger firm also possessed impressive academic backgrounds, including attorneys Korman and Black of the Kohn firm and attorneys Montague and Lerner of the Berger firm. No attempt will be made to detail the backgrounds of all the other attorneys who rendered beneficial services to the class. Suffice it to say that such other attorneys, although younger and not as experienced as petitioners Kohn and Berger, were well qualified to render the legal services for which compensation is sought and that their work was under the supervision and direction of the petitioners themselves.

Not only were petitioners' educational backgrounds and academic attainments of the highest order, but also petitioners have experience in national class action multidistrict litigation that can hardly be equalled by any attorney in the country. 28 U. S. C. § 1407 and the Judicial Panel on Multidistrict Litigation are a direct outgrowth of the avalanche of antitrust suits filed against electrical equipment manufacturers in the early 1960's. Neal and Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A. B. A. J. 621 (1964); Peterson and McDermott, *Multidistrict Litigation: New Forms of Judicial Administration*, 56 A. B. A. J. 737 (1970). Both petitioner Kohn and petitioner Berger actively participated in the electrical equipment cases in the early 1960's, and they have continued to specialize in the relatively new field of multidistrict litigation since then. Petitioner Kohn, Mr. Fine and Miss Korman tried the first of the electrical equipment cases, obtaining a judgment, after trebling of the jury verdict, amounting to some $29,000,000. *Philadelphia Electric Co. v. Westinghouse Electric Corp.*, 1964 TRADE CASES ¶ 71,123 (E. D. Pa. 1964). Reference has previously been made to both petitioners' success in the case of *Philadelphia Electric Co. v. Anaconda Ameri-*

defense counsel the possible settlement of the builder-owner claims only for an amount in excess of $20,000,000.

The ensuing negotiations were long and difficult. Further discussions eventually led to the $21,500,000 settlement offer made by the major defendants other than Briggs Manufacturing Company. When various plaintiffs' attorneys could not agree on either this amount or upon the terms of a formal settlement agreement, petitioner Kohn continued the discussions with defendants' counsel, leading eventually to the execution of an agreement dated February 4, 1970 between petitioners Kohn and Berger and the settling defendants.[17] Under this agreement, the obligations of the defendants were made contingent upon satisfactory resolution of the claims of wholesalers, contractors, public bodies and the purchasers of structures. In succeeding weeks, both petitioners were active in securing the assent of many other builder-owner plaintiffs to the terms of the settlement.[18]

Petitioner Kohn discussed settlement possibilities and strategy with petitioner Berger at every stage of the negotiations. Thus, although petitioner Kohn and Mr. Fine played the active role of meeting with counsel for defendants and for other classes of plaintiffs, the advice and counsel of petitioner Berger contributed directly to the settlement finally achieved.

At a later date, negotiations were conducted with attorneys for the short-line defendants. On August 5, 1970 and November 12, 1970, agreements providing for a settlement fund in the amount of $1,400,000 were executed between petitioners Kohn and Berger and the short-line defendants.

These settlements were formally presented to the Court for preliminary approval at a hearing on May 17, 1971, resulting in the entry of Settlement Order No. 21. Following notice to the prospective members of the class, the settlements were finally approved at a hearing held on April 7, 1972. Counsel for Friendswood and Humble were present and did not object to the settlement. Approval of the settlement was embodied in Settlement Order No. 41, a Judgment, and Findings of Fact and Conclusions of Law which were thereafter filed.

As discussed hereinabove, later negotiations with counsel for the Celotex corporation led to the settlement with that defendant as well. On August 3, 1973, the Celotex settlement (which was not opposed by any claimant) was likewise approved by the Court, and papers of final approval were filed on October 9, 1973.

Petitioners were here participating in no run-of-the-mill class suit.[19] The plumbing fixture antitrust litigation has involved the largest number of cases of any matter that has ever come before the Judicial Panel on Multidistrict Litigation. 374 cases are included in this one massive litigation. Over 10,000 claims were filed in the builder-owner settlement alone.

Complex and novel questions arose because of the large numbers of plaintiffs and classes of plaintiffs competing with each other to establish standing. See *Mangano v. American Radiator & Standard Sanitary Corp., supra,* and *Maricopa County v. American Radiator & Standard Sanitary Corp., supra.*

With national reputations built as a result of their extensive experience in litigation of this nature, petitioners Kohn and Berger were able to provide the leadership necessary so that the many builder-owner plaintiffs and the other plaintiffs as well might unite in presenting their claims against the defendants. Because of the complexity of the competing interests of plaintiffs at various levels of the chain of distribution of plumbing fixtures, no settlement would have been possible without the coordination by all the plaintiffs of their efforts.

In the *Lindy Bros.* opinion, the Third Circuit specifically approved Judge Wyzanski's observation in *Cherner v. Transitron Electronic Corp.,* 221 F. Supp. 55, 61 (D. Mass. 1963), that in complicated cases producing large recoveries, it is not "just" to make a fee "depend solely on the reasonable amount of time expended." The present litigation was indeed a complicated one which produced a very substantial recovery for the claimants.

(b) *The Quality of the Work*

Both petitioner Kohn and petitioner Berger were highly skilled and experienced

[17] In his testimony, Mr. Connolly commented on the "extreme bargaining skill" required for negotiation of this settlement.

[18] Under the settlement agreement, any settling defendant was entitled to withdraw if sufficient acceptances had not been obtained within 30 days.

[19] Counsel for the objectors did not enter an appearance in this case until shortly before the hearing on April 7, 1972, a fact which may explain their characterization of these proceedings as a "relatively simple straight hortzontal price-fixing case."

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and thereafter filed interventions from time to time in that action and also in the action brought on behalf of public body plaintiffs.

On March 28, 1967, the defendants filed a motion seeking to stay all civil proceedings until the criminal case against them in the Western District of Pennsylvania had been concluded. Chief Judge Clary granted an interim stay and the cases were thereupon assigned to Judge John W. Lord, Jr. On May 16, 1967, Judge Lord heard argument on the motion for a stay, which was vigorously opposed by petitioners. The motion was denied on June 7, 1967. *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.* [1967 Trade Cases ¶ 72,139], 269 F. Supp. 540 (E. D. Pa. 1967).

Defendants then applied to Judge Rosenberg, before whom the criminal cases were pending in the Western District of Pennsylvania, seeking an injunction barring further proceedings in the civil cases in Philadelphia until the criminal case was concluded. On July 28, 1967, Judge Rosenberg did enjoin the plaintiffs in these civil actions from proceeding with discovery in their treble damage suits. *United States v. American Radiator & Standard Sanitary Corp.* [1967 Trade Cases ¶ 72,199], 272 F. Supp. 691 (W. D. Pa. 1967). Petitioners and others promptly appealed to the Third Circuit, which thereafter reversed the decision of Judge Rosenberg. *United States v. American Radiator & Standard Sanitary Corp.* [1967 Trade Cases ¶ 72,311], 388 F. 2d 201 (3d Cir. 1967), cert. den. 390 U. S. 922 (1968).

On August 18, 1967, the defendants had also petitioned the Third Circuit, seeking the issuance of a writ of mandamus against Judge Lord's denial of a stay. Petitioners opposed this requested relief, and the application was later denied. Other stays were sought by defendants and successfully opposed by petitioners.

In 1968 and 1969, petitioners actively pressed discovery proceedings. Mr. Connolly testified that in preparing the case for trial, petitioner Kohn was "very much on top of the case." A motion was filed for the production of magnetic tape recordings of conversations between William E. Kramer, of the Plumbing Fixture Manufacturers Association, and various members and associates of that organization. In *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.* [1968 Trade Cases ¶ 72,564], 291 F. Supp. 247 (E. D. Pa. 1968), Judge Lord held that such tapes were subject to production, reserving decision as to some of the tapes with respect to which the defendants claimed an attorney-client privilege. Subsequently, Judge Lord ordered the production of those tapes as well. 294 F. Supp. 1148 (E. D. Pa. 1969).

Petitioners likewise appeared before the Judicial Panel on Multidistrict Litigation and successfully urged that all the plumbing fixture cases be transferred to the Eastern District of Pennsylvania under 28 U. S. C. § 1407. Such transfer was ordered by the Panel on September 13, 1968, which noted that Judge Lord had actively conducted pre-trial proceedings in the cases and had adopted a comprehensive discovery schedule, and that as a result of interventions, the actions in the Eastern District of Pennsylvania then involved more claims for relief than were involved in any other District. *In re Plumbing Fixture Cases* [1968 Trade Cases ¶ 72,666], 295 F. Supp. 33 (J. P. M. L. 1968).

Petitioners had sought to commence settlement negotiations with defendants at an early date, but these discussions had been postponed so that the various questions relating to stays and to discovery could be first resolved. In the fall of 1969, petitioners undertook to resume settlement negotiations, culminating in a meeting at the Engineers' Club in New York City on October 13, 1969. At that time, a large group of plaintiffs' attorneys met with various defendants' attorneys, and an offer of $15,000,000 was made on behalf of the full-line defendants to settle all of the many suits that had been filed. Because of the divergent views expressed at that meeting by the many plaintiffs' attorneys present, nothing definite resulted from these initial discussions. However, it was generally agreed by all plaintiffs that the amount proposed would not be acceptable as a total settlement of the entire litigation.

Efforts were then undertaken to keep settlement negotiations alive. Another meeting was held on October 16, 1969 at which separate groups of plaintiffs were formed, consisting of builder-owners, public bodies, contractors, wholesalers and homeowners. A meeting was next held in petitioner Kohn's office on October 29, 1969, attended by various attorneys for builder-owner plaintiffs and by counsel for three principal defendants. As the wholesalers, contractors and public body groups had indicated that they wanted to negotiate separately, petitioner Kohn discussed with

of Paul R. Connolly in this proceeding.[12] Characterized by counsel for the objectors as "one of the nation's outstanding trial attorneys, who was actively involved in this litigation throughout" and as a "third-party witness",[13] Mr. Connolly was subpoenaed by the objectors. He testified that before settlement was reached all counsel were concerned about the effect of the *Hanover Shoe* decision, that at the time it was not known who would be a proper party plaintiff and that whether the builder-owners had proper standing was debated a great deal in his office. Mr. Connolly asserted that the fact that the government wins a criminal or civil antitrust case does not necessarily mean that a treble damage case can be won. He specifically referred to a recent antitrust case in which he had successfully represented a defendant. Although the government had succeeded in an action against this defendant, Mr. Connolly had persuaded the Court to grant summary judgment in favor of his client "on the ground that the plaintiff consumers in California had no standing."

Finally, serious questions were presented at the outset of this litigation as to whether these suits could have been maintained as a national class action. In some of the cases that had been filed, the plaintiffs had sought state-wide class actions. In *Philadelphia Electric Co. v. Anaconda American Brass Co.* [1968 TRADE CASES ¶ 72,359], 43 F. R. D. 452, 464 (E. D. Pa. 1968), the Court had refused to certify a national builder-owner class on the ground that it was unmanageable, and the Court had limited the class to builder-owners in the Eastern District of Pennsylvania. As was noted by the Court in *City of Detroit v. Grinnell Corp.* [1974-1 TRADE CASES ¶ 74,986], 495 F. 2d 448 (2d Cir. 1974), different competitive climates may exist in the various different jurisdictions where actions of this sort are instituted. The settlement reached here by petitioners satisfactorily resolved these contested class action questions in favor of the formation of a single national class.

Armed with the acutely perceptive vision of hindsight, the objectors argue that petitioners were faced with substantially no risk at all as to any of these questions when they undertook settlement negotiations with defendants. But in assessing the contingent nature of success in a case of this sort, the Court must weigh the factors as they existed before the original settlement agreement was executed on February 4, 1970 and before the Celotex settlement agreement was executed on November 27, 1972. When viewed in that perspective, the contingent nature of success was considerable.[14] Accordingly, this Court concludes that a substantial increased allowance should be made because of the contingency factor.

III

The Quality Factor

The second additional factor which this Court must consider is the extent, if any, to which the quality of an attorney's work mandates increasing or decreasing the amount of the initial determination. In considering this factor, the court should assess the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe and the amount of the recovery obtained. 487 F. 2d at 168. In this case, there were numerous in-court proceedings which occurred before settlement was reached, and these can be weighed and considered from a review of the reported opinions in this case, from the exhibits and other evidence in the present record and from what the undersigned judge has been able to observe since this case was assigned to him.[15]

(a) *History and Complexity of the Litigation*[16]

On December 21, 1966, petitioner Kohn filed two suits in this Court, one on behalf of a national class of builder-owners and the other on behalf of a national governmental class. These were the first national class actions filed in this litigation. On January 20, 1967, petitioner Berger filed motions to intervene on behalf of intervenor plaintiffs in the builder-owner suit

[12] Mr. Connolly's deposition was taken before trial and by agreement was introduced in evidence.

[13] Post-hearing Memorandum of Claimants-Objectors, page 32. Later in their Memorandum, the objectors termed Mr. Connolly's testimony "candid" and "disinterested".

[14] This finding applies to both the original settlement and the Celotex settlement. Celotex (or its predecessor Briggs) held out adamantly until petitioners in the Spring of 1972 undertook discovery in preparation for trial, when Celotex finally agreed to begin settlement discussions.

[15] The undersigned judge was assigned to handle this litigation, commencing in June 1970, by the Judicial Panel on Multidistrict Litigation. Shortly after they were filed, these cases had been assigned to Judge (later Chief Judge) John W. Lord, Jr., who conducted all proceedings in the litigation until it was re-assigned.

[16] Many of the findings contained in this portion of the opinion were also made in this Court's earlier opinion. 341 F. Supp. at 1087-1089.

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(4) the fact that the time period and range of products encompassed within the government's evidence in the criminal case was drastically more limited than the allegations in the complaints herein; and

(5) the settling defendants' denials of any violation of the antitrust laws and any overcharges, and the fact that they could have been expected to litigate all issues fully, including appeals if necessary.

The objectors argue that liability could have been easily established because criminal prosecutions had preceded the filing of these civil suits. But only three of the sixteen defendants were convicted. The other thirteen entered pleas of *nolo contendere*. The Third Circuit has recognized "that convictions following pleas of *nolo contendere* are not entitled to the same evidentiary position as convictions following not guilty pleas, and that even where violation of the antitrust laws is established, civil plaintiffs must prove that they were injured by the violation." 487 F. 2d at 168, n. 12.

In the full-line indictment, the government charged a conspiracy lasting for some four years, from 1962 to 1966. However, the evidence of price-fixing submitted by the government at the criminal trial was limited substantially to the period from mid-September 1962 until June or July, 1963, some nine months. By the end of 1963, the defendants had learned that funds of their trade association had been embezzled by its Secretary, William Kramer, and that Kramer had attempted to blackmail the defendants by threatening to furnish the government with evidence of price-fixing if he were prosecuted. Since these threats were reported to the Justice Department in late 1963, it is hardly conceivable that defendants would have continued their alleged price-fixing conspiracy after that date. In particular, defendant American Standard instituted extraordinary procedures in late 1963 to insure that no price changes were in any way the result of discussions among competitors.

At the criminal trial, the government did not present evidence that the defendants had agreed among themselves concerning the prices actually charged. (See Petitioners' Exhibit No. 27.) The proof offered did no more than show an agreement to fix prices which was not put into effect and the government argued successfully that such an agreement constituted a violation of the antitrust laws.[11] Unlike most criminal price-fixing prosecutions, the available government proof here did not readily lend itself to a showing of damages by plaintiffs in subsequent civil actions.

Thus, this was not a case where plaintiffs received from the government on a silver platter the evidence necessary to prove their claims against the three convicted defendants, much less against the thirteen which had entered pleas of *nolo contendere*. Substantial problems of proof were present as to both liability and damages. Yet petitioners were able to negotiate settlements with all defendants which yielded funds producing $10.75 for each bathroom unit purchased by claimants during the full four-year period.

Plaintiffs were faced with yet another substantial legal hurdle. Because of the nature of the plumbing fixture industry, there were claimants at various different levels of the chain of distribution of these products. Ultimately, separate classes of wholesalers, of plumbing and other contractors, of public bodies and of builder-owners were formed. Assuming that violations of the antitrust laws could be proved, the further question remained concerning which purchaser at the various different levels of the chain had the right to collect damages. Before settlement was reached, representatives of each of these prospective classes claimed that they alone were entitled to the sole recovery.

This problem of standing, which arose under the decision of the Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* [1968 TRADE CASES ¶ 72,490], 392 U. S. 481 (1968), became of more immediate concern in this litigation when the decisions were rendered by this Court in *Mangano v. American Radiator & Standard Sanitary Corp., supra*, and *Maricopa County v. American Radiator & Standard Corp., supra*. Counsel for the defendants were well aware of the import of these decisions and consistently took the position that they would assert this defense against builder-owner plaintiffs.

That the pass-on problem was an extremely troublesome one is shown by the testimony

[11] In affirming the criminal convictions, the Third Circuit discussed at some length the strength of the defendants' economic evidence. *United States v. American Radiator & Standard Sanitary Corp.* [1970 TRADE CASES ¶ 73,331], 433 F. 2d 174, 197 (3d Cir. 1970), cert. den. 401 U. S. 948 (1971). The Court noted that such evidence "could hardly have been easily dismissed by the trier of fact."

(d) *Summary—The Initial Determination*

For the reasons stated, this Court finds that the initial required determination based on the number of hours spent by each individual attorney is as follows:

(1) *Lawyers' time to March 20, 1974*

Category	Kohn Firm	Berger Firm	Total
Pleadings	$ 5,910.00	$ 1,295.00	$ 7,205.00
Discovery	96,797.50	38,727.00	135,524.50
Court Appearances	47,145.00	13,295.00	60,440.00
Settlement	45,312.50	8,245.00	53,557.50
Fee Application and Appeal	23,123.75	6,682.50	29,806.25
Interventions	1,650.00	11,435.00	13,085.00
Settlement Administration	61,218.75	.....	61,218.75
Briefs and Legal Research	40,147.50	1,202.00	41,349.50
General Matters	100,647.50	49,937.85	150,585.35
Other Appellate Proceedings	1,750.00	.....	1,750.00
Sub-Total	$423,702.50	$130,819.35	$554,521.85
(2) *Paraprofessional and law students*			4,874.00
(3) *Time spent since March 20, 1974*			40,654.00
(4) *Future time*			10,000.00
Total			$610,049.85

All of the activities listed above contributed to the ultimate result. The aggregate amount of the initial determination is thus $610,049.85, which this Court finds to be reasonable compensation based solely on considerations of the time expended without reference to other factors.

II

The Contingency Factor

Once the Court has made the required initial determination, there are two other factors to be considered in determining reasonable compensation. The first of these is the contingent nature of success. 487 F. 2d at 168.

As the Third Circuit has pointed out, the contingency factor is of special significance in a case such as this one where the petitioners had no private agreements which guaranteed payment if no recovery were ultimately obtained. What the Court must do is assess from the evidence the extent to which the attorneys' compensation should be increased to reflect the unlikelihood of success. If the contingency is slight or if the initial amount found to constitute reasonable compensation is a large proportion of the total recovery, then the Court may conclude that an increased allowance for the contingent nature of the fee should be minimal or that there should be no increase at all. See 487 F. 2d at 168.

Here the amount initially found to constitute reasonable compensation on a time basis is a very small proportion of the total recovery, approximately 2%. Furthermore, the contingency was considerable in this case, and this Court has therefore concluded that there should be a substantial increase because of this factor.

In approving the builder-owner settlements, this Court made specific findings of fact concerning the likelihood of the plaintiffs' success in this litigation.[10] Whether or not the objectors are now bound by these earlier determinations, the record now before the Court fully supports the express findings previously made. Accordingly, the following factors are hereby adopted in support of this Court's conclusion that the risk was considerable when petitioners undertook to negotiate a settlement of this massive litigation:

(1) the uncertainty of the class members' ability to prove liability and damages;

(2) the existence of other categories of claimants in this litigation contending that they and not the builder-owners were entitled to any recovery against the defendants;

(3) this Court's prior decision in *Maricopa County v. American Radiator & Standard Sanitary Corp.* [1971 TRADE CASES ¶ 73,410], 323 F. Supp. 381 (E. D. Pa. 1970), and *Mangano v. American Radiator & Standard Sanitary Corp.* [1970 TRADE CASES ¶ 73,168], 50 F. R. D. 13 (E. D. Pa. 1970), aff'd [1971 TRADE CASES ¶ 73,477], 438 F. 2d 1187 (3d Cir. 1971);

[10] Paragraph 17 of Findings of Fact filed May 17, 1972 and Paragraph 16 of Findings of Fact filed October 9, 1973.

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pertinent facts necessary for a proper decision. Services performed in this connection are indeed of benefit to the class as a whole because they enable the Court to make its determination on the basis of a full and accurate presentation of all relevant facts. This is not to say, however, that the final *rate* of compensation will be the same as it might be for other services performed by the attorneys.[9] But the time properly expended by petitioners in presenting these important issues to the Court should initially be included.

Under the position espoused by the objectors, a petitioning attorney would receive no compensation whatsoever for time spent in compiling the extensive data needed by the Court, in preparing briefs and exhibits and in appearing in court to explain the basis for the application. Such a rule would encourage the expenditure of minimum time and effort by a petitioning attorney in connection with an important phase of the administration of the fund. The result under such circumstances could very well be an excessive or improperly allocated award, not based on all relevant facts and circumstances. Where, as here, substantial fees are sought from a multimillion dollar fund, the benefit to the class as a whole from the performance of these services in a thorough and careful manner makes it appropriate for the additional cost to be charged to the fund.

Similarly, time spent by both petitioners in connection with interventions was beneficial to the class as a whole. Many of these intervenors were substantial national firms and afforded broad geographical representation to the class. Before the settlement agreement was reached, defendants vigorously opposed the formation of a national class. In *P. D. Q. Inc. of Miami v. Nissan Motor Corp.*, 61 F. R. D. 372 (S. D. Fla. 1973), the Court refused to permit the case to proceed as a national class action because the Court was not satisfied that the financial strength of the representative parties was sufficient to support the considerable expense of conducting a complicated antitrust case.

Faced with many additional litigants with sufficient financial resources to finance the cost of notice to the class and also the cost of a protracted trial, defendants in this case were under much more pressure to settle than otherwise. In its recent decision in *Eisen v. Carlisle & Jacquelin* [1974-1 Trade Cases ¶ 75,082], — U. S. — (May 28, 1974), the Supreme Court held that class representatives must pay the cost of the notice required by Rule 23 in a case such as this one. The cost of notice in this case was approximately $150,000, a sum which was paid from the settlement fund. Had there been no settlement, plaintiffs and intervenors would have been required to advance this sum if this litigation were to go ahead as a national class action.

(c) *The Kohn Time*

The objectors further argue that the time recorded by the Kohn firm was inflated and that the total figures should arbitrarily be reduced by 20%. There is no support in the record for this contention.

The objectors point out that on occasion petitioner Kohn (and also petitioner Berger) recorded as much as 16 hours a day. They urge that any such hours recorded must necessarily have been inflated, and they ask for an across-the-board reduction of all the time claimed by the Kohn firm. This Court does not find it surprising that on occasion petitioners or members of their law firms recorded as much as 16 hours. Whether or not counsel for the objectors or their opponents in other cases are accustomed to working more than 6 or 8 hours a day, this Court would note from its experience with trial attorneys engaged in major litigation that it is not at all unusual for a trial lawyer to work as much as 16 hours during a particular 24-hour period. In any event, the testimony and affidavits in the record fully support the time claimed by both petitioners. No such arbitrary reduction as sought by the objectors will therefore be made.

Petitioners have estimated that an additional 100 hours of Mr. Fine's time will be necessary to complete final administration of the settlement. The objectors oppose any allowance for this future time. Obviously, additional attorneys' time will be required for the distribution of the remaining portion of the fund to the many thousands of claimants involved. From its knowledge of these proceedings, this Court concludes that 100 hours is a reasonable estimate and that the allowance should be made as requested.

[9] A further discussion of the reasonableness of any increase of this part of the initial determination is to be found in a later section of this opinion.

sonably accurate. See *In Re Borgenicht*, 470 F. 2d 283, 284 (2d Cir. 1972).

The evidence here discloses that the reconstruction was carefully and accurately done. Correspondence, pleadings, briefs and other material in the files were reviewed by an attorney with experience in such matters and a time figure was assigned. Time records of other attorneys were examined, as were court records and transcripts where an attorney had appeared in court. Indeed, from the record as a whole, it appears that petitioner Berger and his firm probably spent more time than they are claiming in connection with this litigation.

As surprising as it seems that a firm with the reputation of the Berger firm rarely kept time records prior to 1972, the nature of Berger's practice provides an explanation for this practice. Representing primarily plaintiffs during the period in question, the Berger firm did not normally bill its clients on the basis of an hourly rate. Most cases were undertaken on a wholly contingent basis, and in some a retainer was paid at the outset. As time records played no part in ascertaining the ultimate fee, the firm in those years did not keep such records.

Certainly today, in view of the emphasis placed by the Third Circuit in its *Lindy Bros.* opinion on the time factor as the "lodestar" of a court's fee determination, every attorney who would seek an award of attorney's fees should keep complete and accurate time records. Nevertheless, failure to maintain such records prior to 1972 should not necessarily disqualify a petitioner from receiving any award at all. This Court finds that the reconstructions undertaken here were sufficient to permit the Court to consider the total time claimed by the Berger firm in the same manner as that claimed by the Kohn firm.

(b) *The Challenged Categories*

In Category No. 5, petitioners have included time spent in negotiating fee agreements with their private clients, and in Category No. 7, time has been included which was spent in preparing claim forms for private clients. The objectors contend that the hours claimed in each category should be excluded by the Court in making its initial determination because such time did not contribute to the creation of the settlement fund or otherwise benefit the class. This Court would agree.

Petitioners Kohn and Berger represent litigants who will receive approximately 18.2% of the fund. Petitioners will receive fees from such clients amounting to $861,191, under negotiated private agreements which provide for the payment of contingent fees.[8] Petitioners seek to charge all members of the class for time spent negotiating these agreements. In order that their clients might be entitled to receive the amounts ultimately awarded to them (an aggregate sum of approximately $5,300,000), petitioners prepared and filed detailed claim forms. They similarly seek fees from the entire class for these services.

The time spent by petitioners in connection with both of these activities quite clearly was not of benefit to the class as a whole. The benefit was conferred on those litigants whom petitioners represented, and petitioners will be compensated for the time so expended under their private fee agreements. Thus, the time for both petitioners set forth under Categories 5 and 7 will be excluded by the Court in making the initial determination.

All other Categories, however, are properly chargeable to the entire class. In particular, this Court finds that these petitioners may properly claim time spent in applying to the Court for an award of attorneys' fees and also time spent in connection with interventions.

The objectors argue that time expended by petitioners in preparing and supporting their fee applications in this Court and in the Third Circuit Court of Appeals is antagonistic to the interests of the class. Such an argument misconceives the true nature of a proceeding such as the present one. Under the equitable fund doctrine, the court is empowered to compensate an attorney whose actions in commencing, pursuing and settling litigation benefit a class of persons not participating in the litigation. 487 F. 2d at 165. A part of the attorney's services would include time spent in preparing his fee petition, presenting it to the Court and defending it both at the trial and at the appellate level. Such time is a part of the administrative expense necessarily incurred in administering the fund. Under the detailed standards and guidelines laid down by the *Lindy Bros.* opinion, a substantial amount of work must necessarily be undertaken by a petitioning attorney, if the trial court is to have before it all the

[8] At the time of the earlier hearing, this figure was $802,707. The increase is attributable to the later Celotex settlement and other additions to the fund.

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that the services rendered by him and his firm were of substantial benefit to the class.

As discussed more fully hereinafter, petitioner Berger, like petitioner Kohn, has an unequalled national reputation as a plaintiffs' class action attorney.[7] His mere presence as a member of the attorneys' team representing the plaintiffs in and of itself would be of considerable benefit. Confronted with an additional opponent with the skill and experience of petitioner Berger, counsel for defendants were under much more pressure to agree to a settlement favorable to the claimants. Like petitioner Kohn, petitioner Berger was not only capable of successfully conducting a national class action litigation, but also was possessed of a visible track record which demonstrated his successes in this field. Petitioners Kohn and Berger were co-counsel in the brass mill tube antitrust litigation, in which Judge Fullam found that "[T]he abilities and standing of petitioning counsel are very high." *Philadelphia Electric Co. v. Anaconda American Brass Co.* [1969 TRADE CASES ¶ 72,892], 47 F. R. D. 557, 559 (E. D. Pa. 1969). Petitioner Berger and his firm prosecuted the rock salt litigation, which was finally settled shortly before trial after all discovery had been completed and after the case had been fully pre-tried. *City of Philadelphia v. Morton Salt Co., et al.*, Civil No. 33781 (E. D. Pa., filed July 1963). In *Professional Adjusting Systems of America, Inc. v. General Adjusting Bureau* [1973-1 TRADE CASES ¶ 74,554], 352 F. Supp. 648, 651 (E. D. Pa. 1972), Judge Newcomer referred to petitioner Berger as "one of the most able antitrust lawyers in the country * * *."

From the evidence here, this Court finds that petitioner Kohn consulted with petitioner Berger at every stage of the proceedings. Kohn valued Berger's judgment and advice, and the briefs and pleadings filed during the early stages of the litigation were reviewed with Berger or members of his firm. Petitioner Berger's name appears as co-counsel for the plaintiffs in a large number of the briefs and pleadings filed with the Court. In the original settlement agreement which was approved by Settlement Order No. 21, petitioner Berger signed with petitioner Kohn as counsel for the settling plaintiffs.

As more fully discussed, *infra*, the intervention in this litigation by the many clients represented by petitioner Berger was of considerable benefit to the class as a whole. Without the broad, national base and the overall financial strength which resulted from the work done by petitioner Berger in connection with these interventions, defendants would have been under less pressure to settle.

As the time records show, petitioner Berger and his firm quite clearly spent less time in connection with this litigation than did petitioner Kohn. The total Kohn time for attorneys is 4,533 hours through March 20, 1974 and the Berger figure for this same period is 1,954 hours. But the fact that Berger was not as active as Kohn and the fact that he spent less time does not support the objectors' contention that all of his time should be excluded. This Court finds that there was no duplication of time or unnecessary overlapping of the services rendered by these two law firms. Indeed, only because of the expertise and experience of both Berger and Kohn was this massive litigation concluded with such a relatively small expenditure of time. Petitioner Berger's efforts were productive in contributing to the creation of the settlement fund, and his time should be considered in the same manner as that of petitioner Kohn in determining what would be a reasonable fee to be awarded.

The objectors further argue that the time claimed by the Berger firm is not adequately supported by evidentiary proof. The evidence indicates that before April 1972, lawyers in the Berger firm rarely kept time records and that a large part of the time claimed by such firm results from a reconstruction. The objectors contend that such reconstruction is so unreliable that all of the Berger time should be excluded.

Quite obviously, contemporary time records, kept on a day-by-day basis by individual attorneys, are the most accurate means of establishing the amount of time that a lawyer has devoted to a particular activity. But time records, although highly desirable, are not the only means of proving time spent in a multidistrict litigation of this sort. See *In Re Four Seasons Securities Laws Litigation*, 59 F. R. D. 657, 664 (W. D. Okla. 1973). Although mere estimates of time are not acceptable, an allowance of attorneys' fees may be based on a reconstruction, provided that the time records are substantially reconstructed and are rea-

[7] A more detailed discussion of petitioner Berger's education, experience and reputation is set forth in that portion of this opinion dealing with the quality factor, *infra*.

The prevailing charge for paraprofessional services in the Philadelphia area is $20 an hour. The dollar amounts for paraprofessional and law students' time would therefore be as follows:

Fee Application	$ 320.00
Clients' Claim Forms	19,830.00
General Matters	4,554.00
Total	$24,704.00

The evidence further discloses that since March 20, 1974 the Kohn firm has spent additional time in connection with its fee application in the dollar amount of $31,600 and the Berger firm has spent similar additional time amounting to $9,054. Thus, the total figures for all categories to date are as follows:

Attorneys' time	$570,006.85
Paraprofessional and law students	24,704.00
Time spent since March 20, 1974	40,654.00
Total	$635,364.85

The above findings as to hours spent and amounts have either been agreed to by way of stipulation between the parties or are not otherwise seriously disputed.[5] In opposing the pending applications for fees, Friendswood and Humble (hereinafter referred to as "the objectors") contend that none of the Berger time should be included in an award by the Court and that all the time for both firms in four different categories should likewise be excluded because such time conferred no benefit on the class as a whole. The four categories challenged are: No. 5—Fee Agreements, No. 6—Fee Application and Appeal, No. 7—Clients' Claim Forms and No. 8—Interventions. Thus, the objectors assert that the only categories and dollar amounts which the Court should consider in awarding fees are the following:

Category	Kohn Firm
Pleadings	$ 5,910.00
Discovery	96,797.50
Court Appearances	47,145.00
Settlement	45,312.50
Settlement Administration	36,982.50
Briefs and Legal Research	40,147.50
General Matters	100,841.25
Appellate Proceedings	1,750.00
Total	$374,886.25

Furthermore, the objectors contend that the time charged by the Kohn firm is inflated and should be discounted by 20%. Thus, objectors assert that the proper amount due petitioners on the basis of the number of hours spent multiplied by a reasonable rate for each attorney would come to $299,909.00. On the other hand, petitioners contend that all the hours spent by both the Kohn firm and the Berger firm benefitted the class, and petitioners assert that in making the required initial determination this Court should use as the basis for further computations the figure of $635,364.85.

(a) *The Berger Contribution*

The fee petitions presently before the Court were filed jointly on behalf of Harold E. Kohn and David Berger and their respective law firms. On December 21, 1966, petitioner Kohn filed suit in this District on behalf of a national class of builder-owners.[6] Civil No. 41774. Another action was filed by Kohn at the same time on behalf of a national class of public bodies. Civil No. 41773. These were the first national class actions instituted in this litigation.

About a month later, on January 20, 1967, petitioner Berger filed motions to intervene on behalf of intervenor plaintiffs in the public body suit and thereafter intervened on behalf of numerous clients in both suits. The intervenors included large, nationally known builder-owners as well as smaller builder-owners and housing authorities from all over the United States. Kohn and Berger agreed to and did in fact conduct the litigation jointly, although the Kohn firm was more active than the Berger firm and spent more time in conducting the litigation. Petitioners Kohn and Berger have entered into an agreement whereby the fees awarded to them by the Court and the fees charged by each of them to their clients will be shared equally.

The objectors argue that petitioner Berger did virtually nothing to benefit the class and that the Court should exclude all of Berger's time in making the required initial determination. They further assert that petitioner Berger will be adequately compensated for his time by contingent fees to be paid directly to him by his clients.

The record in this case does not support objectors' position. This Court finds that the time spent by petitioner Berger and members of his firm contributed materially to the creation of the settlement fund and

[5] In the Pre-trial Order, petitioners reserved the right to contend that higher hourly rates than shown might be appropriate and the objectors reserved the right to contend that these were the maximum hourly rates which the Court might find to be reasonable for the initial determination which the Court must make.

[6] The statement in this Court's previous opinion that this original action was filed by both Kohn and Berger is incorrect.

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3. Court Appearances	Hours
Harold E. Kohn	106.00
Aaron M. Fine	326.00
Dolores Korman	10.25
Allen D. Black	16.50
David Berger	63.20
Herbert B. Newberg	42.20
H. Laddie Montague, Jr.	20.80
Alan M. Lerner	17.20
Howard L. Schambelan	2.50
Total	604.65

4. Settlement	Hours
Harold E. Kohn	212.50
Aaron M. Fine	187.50
David Berger	1.00
Herbert B. Newberg	79.00
H. Laddie Montague, Jr.	1.50
Alan M. Lerner	49.70
Total	531.20

5. Fee Agreements	Hours
Harold E. Kohn	17.00
Aaron M. Fine	26.50
Dolores Korman	10.00
James A. Sutton	1.50
Marcus Manoff	0.50
Herbert B. Newberg	1.50
Sylvan M. Cohen	1.00
Edward N. Polisher	0.50
Phillip M. Shiekman	1.50
Mayor Shanken	1.30
Sidney Margulies	2.20
Murray A. Zatman	2.50
Total	66.00

6. Fee Application, Appeal and Remand	Hours
Harold E. Kohn	47.75
Aaron M. Fine	170.50
Dolores Korman	1.50
David Berger	13.00
H. Laddie Montague, Jr.	72.25
Total	305.00
Paraprofessional time	16.00

7. Clients' Claim Forms	Hours
Aaron M. Fine	12.00
Dolores Korman	4.50
Herbert B. Newberg	106.50
Alan M. Lerner	3.50
Total	126.50
Paraprofessional time	991.50

8. Interventions	Hours
Aaron M. Fine	16.50
Herbert B. Newberg	141.70
H. Laddie Montague, Jr.	18.30
Alan M. Lerner	4.70
Total	181.20

9. Settlement Administration	Hours
Harold E. Kohn	6.00
Aaron M. Fine	471.25
Dolores Korman	19.25
Allen D. Black	342.75
Total	839.25

10. Briefs and Legal Research	Hours
Aaron M. Fine	370.50
Dolores Korman	44.25
Herbert B. Newberg	11.80
H. Laddie Montague, Jr.	1.80
Alan M. Lerner	5.00
Total	433.35

11. General Matters	Hours
Harold E. Kohn	291.25
Aaron M. Fine	517.75
Dolores Korman	85.00
Stuart H. Savett	15.75
David H. Marion	23.75
Arthur M. Kaplan	6.00
Michael D. Hausfeld	5.25
David H. Weinstein	0.50
Leonard Barrack	39.25
Barney B. Welsh	35.25
Stephen E. Haberfeld	1.00
Helen H. Stern	0.50
Robert W. Maris	0.50
John M. Elliott	22.25
Edward F. Mannino	8.25
David Berger	136.35
Herbert B. Newberg	383.00
H. Laddie Montague, Jr.	63.63
Alan M. Lerner	32.60
Gerald J. Rodos	18.50
Total	1,686.33

12. Other Appellate Proceedings	Hours
Aaron M. Fine	17.50
Total	17.50

If the reasonable hourly rate for each attorney is multiplied by the number of hours each attorney spent, the dollar amounts for each category are as follows:

Category	Total	Kohn Firm	Berger Firm
1. Pleadings	$ 7,205.00	$ 5,910.00	$ 1,295.00
2. Discovery	135,524.50	96,797.50	38,727.00
3. Court Appearances	60,440.00	47,145.00	13,295.00
4. Settlement	53,557.50	45,312.50	8,245.00
5. Fee Agreements	6,340.00	5,602.50	737.50
6. Fee Application and Appeal	29,806.25	23,123.75	6,682.50
7. Clients' Claim Forms	9,145.00	1,515.00	7,630.00
8. Interventions	13,085.00	1,650.00	11,435.00
9. Settlement Administration	61,218.75	61,218.75	.....
10. Briefs and Legal Research	41,349.50	40,147.50	1,202.00
11. General Matters	150,585.35	100,647.50	49,937.85
12. Other Appellate Proceedings	1,750.00	1,750.00	.....
Total	$570,006.85	$430,820.00	$139,186.85

Category	Total Time	Kohn Firm	Berger Firm
1. Pleadings	87.00	68.50	18.50
2. Discovery	1,609.55	973.75	635.80
3. Court Appearances	604.65	458.75	145.90
4. Settlement	531.20	400.00	131.20
5. Fee Agreements	66.00	55.50	10.50
6. Fee Application and Appeal	305.00	219.75	85.25
7. Clients' Claim Forms	126.50	16.50	110.00
8. Interventions	181.20	16.50	164.70
9. Settlement Administration	839.25	839.25	.....
10. Briefs and Legal Research	433.35	414.75	18.60
11. General Matters	1,686.33	1,052.25	634.08
12. Other Appellate Proceedings	17.50	17.50	.....
Total	6,487.53	4,533.00	1,954.53

A similar breakdown of the total time spent during the same period by law students and paraprofessionals is as follows (by hours):

Category	Total Time	Kohn Firm	Berger Firm
Fee Application	16.00	....	16.00
Clients' Claim Forms	991.50	....	991.50
General Matters	227.70	60.00	167.70
Total	1,235.20	60.00	1,175.20

In valuing attorneys' services in a case such as this one, a court after determining the amount of time expended should then fix a reasonable hourly rate for each attorney who has worked on the case, taking into account each attorney's legal reputation and his status as a senior partner, junior partner or associate. 487 F. 2d 167. In the Kohn firm, twenty different attorneys worked on this case. The reasonable hourly rate for the time of each is determined to be as follows:

The Kohn Firm		Year Admitted to Practice
Harold E. Kohn	$125.00	1938
Aaron M. Fine	100.00	1949
Dolores Korman	70.00	1957
Stuart H. Savett	60.00	1964
David H. Marion	60.00	1964
Herbert E. Milstein	65.00	1961
Arthur M. Kaplan	35.00	1971
Donald L. Weinberg	35.00	1971
Allen D. Black	35.00	1967
Michael D. Hausfeld	35.00	1969
Leonard Barrack	35.00	1969
Barney B. Welsh	40.00	1968
Stephen E. Haberfeld	35.00	1971
Helen H. Stern	35.00	1967
David H. Weinstein	35.00	1969
James A. Sutton	65.00	1938
Marcus Manoff	60.00	1941
Robert W. Maris	50.00	1963
John M. Elliott	35.00	1966
Edward F. Mannino	35.00	1967

In the Berger firm, twelve different attorneys worked on this case. A reasonable hourly rate for the time of each of these attorneys is determined to be as follows:

The Berger Firm		Year Admitted to Practice
David Berger	$125.00	1938
Herbert B. Newberg	70.00	1962
H. Laddie Montague, Jr.	70.00	1964
Howard L. Schambelan	50.00	1965
Gerald J. Rodos	35.00	1971
Sylvan M. Cohen	100.00	1939
Edward N. Polisher	100.00	1923
Phillip M. Shiekman	100.00	1951
Mayor Shanken	70.00	1962
Sidney Margulles	70.00	1957
Alan M. Lerner	50.00	1966
Murray A. Zatman	35.00	1967

A further breakdown of the total time spent under each category to show which attorneys performed which services is as follows:

1. Pleadings	Hours
Harold E. Kohn	3.50
Aaron M. Fine	30.75
Dolores Korman	34.25
Herbert B. Newberg	16.50
H. Laddie Montague, Jr.	2.00
Total	87.00

2. Discovery	Hours
Aaron M. Fine	954.50
Dolores Korman	19.25
David Berger	43.00
Herbert B. Newberg	182.20
H. Laddie Montague, Jr.	3.40
Alan M. Lerner	387.70
Howard L. Schambelan	19.50
Total	1,609.55

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As noted in this Court's original opinion, the settlement previously approved by the Court covered the claims of a nation-wide class of builder-owners asserted against the so-called short-line defendants and against the so-called full-line defendants except for Briggs Manufacturing Company. 341 F. Supp. at 1079-1080. When these matters were previously before the Court, the aggregate amount of the settlement fund was approximately $26,000,000.

Following final approval of this settlement on April 7, 1972, petitioner Kohn undertook steps to press the claims of the builder-owner class against the one remaining full-line defendant. As a result of a corporate merger, the Celotex Corporation was at or about this time the successor to Briggs Manufacturing Company and was substituted for Briggs in those actions in this litigation in which Briggs had been named as a defendant.

On June 27, 1972, this Court designated petitioner Kohn and his associate Aaron M. Fine as lead counsel in the litigation against Celotex. Various discussions were thereafter held between counsel for Celotex and petitioner Kohn in an attempt to settle the outstanding builder-owner claims against this one remaining full-line defendant. These negotiations eventually led to a settlement with Celotex in the amount of $1,150,000. A settlement agreement dated November 27, 1972 was executed by counsel for Celotex and by Messrs. Kohn and Fine on behalf of a proposed national class of builder-owner claimants.

Following a hearing on February 16, 1973, this Court entered Settlement Order No. 74 on February 23, 1973, which gave preliminary approval to the proposed builder-owner settlement and appointed the plaintiffs in Civil No. 41,774 as the class representatives. Following due notice to the class, a hearing was held on August 3, 1973 to consider whether this settlement with Celotex should be finally approved. There was no opposition, and the Court indicated that it would give final approval to the settlement as submitted. Findings of Fact, Conclusions of Law, a Judgment and Settlement Order No. 77, formally approving the Celotex settlement, were entered on October 9, 1973.

At the time of the hearing held on August 3, 1973 to consider final approval of the Celotex settlement, the Court also had before it an application by petitioner Kohn for the award of attorneys' fees and expenses from the Celotex settlement fund. As a decision had not by that date been handed down by the Third Circuit in the *Lindy Bros.* appeal and as Friendswood and Humble were objecting to the award of fees in connection with the Celotex settlement on the same grounds as they were asserting in the appeal, this Court determined that no award of fees would be made from the Celotex fund until the appeal had been decided.

At the evidentiary hearing held following remand, counsel agreed that the original fund and the Celotex fund should be treated, for purposes of deciding the questions before the Court, as a single fund and that the total time spent by petitioners should be aggregated. Thus, although there are separate petitions before the Court (one filed pursuant to Settlement Order No. 21 and one filed pursuant to Settlement Order No. 74), only one award will be made.[4] The combined fund produced by the efforts of the petitioners, including interest, is now approximately $29,300,000, and the total time expended by the petitioners in producing such combined fund through March 24, 1974 is 6,487 hours of attorneys' time and 1,235 hours of paraprofessional and law students' time.

I

The Time Factor

In detailing in its *Lindy Bros.* opinion the standards that should guide the trial judge in awarding fees to attorneys successfully concluding class suits, the Third Circuit has directed that the first inquiry of the court should be into the hours spent by the attorneys. Not only should the court inquire as to the number of hours spent, but it should also determine in what manner the time was expended and by which attorneys.

From the evidence, this Court finds that the total time spent by the Kohn firm and the Berger firm through March 20, 1974, classified under appropriate specific categories, is as follows (in hours):

[4] Allocation of the fee awarded to the separate funds will be made at a later date and will be determined on a proportional basis.

Court's refusal to award any fees to them. The orders awarding fees to attorneys Kohn and Berger and denying fees to the Thoma attorneys were vacated by the Third Circuit, and it is these matters which have been remanded for further proceedings consistent with that Court's opinion.

The original opinion of this Court is reported in *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Corp.* [1972 TRADE CASES ¶ 73,953] 341 F. Supp. 1077 (E. D. Pa. 1972). That opinion was concerned with various applications for attorneys' fees and expenses. No appeals were taken from the rulings of this Court which awarded expenses to the Settlement Committee, which, *inter alia*, allowed reimbursement from the settlement fund of expenses incurred by Mr. Kohn and eleven other attorneys or firms who had filed suits in this litigation and which denied *in toto* ten other petitions, besides that of the Thoma firm, also seeking the award of attorneys' fees from the settlement fund.

In its opinion, the Third Circuit first rejected the contention advanced by Friendswood and Humble that this Court lacked authority to award any fees at all to petitioners Kohn and Berger from that portion of the settlement fund to be distributed to claimants who would receive distributions from the fund but who either did not file suit or were not included as settling parties. In approving an award payable directly to attorneys for services to unrepresented claimants, the Third Circuit recognized that a district judge is empowered to exercise his informed discretion in awarding such fees and that any successful challenge to his determination must show that he abused that discretion. 487 F. 2d at 166. However, the Third Circuit further held that in making an award to petitioners Kohn and Berger, this Court had not followed proper standards and directed that an evidentiary hearing should be held on remand so that there might be an evidentiary basis for applying such standards.

In discussing the proper standards which would govern the award of fees in a case of this sort, the Third Circuit said that the first inquiry of the Court should be into the hours spent by the attorneys, including how many hours were spent in what manner by which attorneys. 487 F. 2d at 167. After determining the time spent, the district court should then undertake to fix an hourly rate of compensation to be applied to the hours worked. While the amount thus found to constitute reasonable compensation should be the "lodestar" of the Court's fee determination, at least two other factors should be taken into account in computing the value of attorneys' services, namely the contingent nature of success and the extent, if any, to which the quality of an attorney's work mandates either increasing or decreasing the amount to which the Court has found the attorney reasonably entitled. 487 F. 2d at 168. Finally, after determining the total reasonable value of an attorney's services in securing recovery of a fund for the class, the Court should determine what portion of that amount should be paid by the unrepresented claimants. 487 F. 2d at 169.

Following remand, the relatively small claim of the Thoma firm was settled. Thus, the sole remaining question before the Court is the amount of the award to be made to petitioners Harold E. Kohn and David Berger as reasonable attorneys' fees, pursuant to the detailed standards and guidelines now established by the Third Circuit. In their original petition, these petitioners had sought fees from the total fund in the amount of some $3,037,000. For the reasons set forth in this Court's earlier opinion, an award approximating $1,375,000 had been previously made, representing 20% of the portion of the fund to be paid to unrepresented claimants.[2] 341 F. Supp. at 1090.

Following remand of this matter, this Court permitted further discovery to be undertaken in light of the new standards established by the Third Circuit. Interrogatories were served and answered, and depositions of petitioner Berger and of various members of the Kohn firm and of the Berger firm were taken. Several formal pre-trial conferences were held in open court, and a detailed Pre-trial Order has been approved and filed. At the evidentiary hearing, numerous documents were admitted in evidence, and petitioner Kohn was the only witness called by either side to testify.[3] However, by agreement, all the depositions were made a part of the record.

[2] Eleven other attorneys or firms had petitioned for the award of fees totalling in the aggregate in excess of $1,000,000. These petitions were denied *in toto*.

[3] Neither side produced any expert testimony. As the Third Circuit noted, expert testimony is not necessary to establish the value of a lawyer's services, as a judge is presumed knowledgeable as to the fees charged by attorneys in general and as to the quality of legal work presented to him by particular attorneys. 487 F. 2d at 169.

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receive from their own clients) would be 20% of the amount distributable to the unrepresented claimants, and secondly because the litigants in Category 2 would be paying a disproportionately large percentage of their recoveries if required to pay any part of petitioners' fees.

In the present posture of the case, petitioners would not be adequately compensated if they were denied recovery of 53.8% of the award here. On the other hand, if this portion of the award were allocated against the litigants in Category 2, they would be paying fees totaling some 24% to 44% of their recoveries while the unrepresented claimants would be paying as fees only some 4% of their recoveries.

This Court concludes that the value of the benefits conferred on the unrepresented claimants by the many attorneys who represented litigants in Category 2 and who contributed to the creation of the settlement fund is at least $610,503.81. The value of the benefits conferred by petitioners on the litigants in Category 2 has been found to be that amount. An equitable set-off should thus be made. In lieu of being required to pay substantial fees to attorneys representing litigants in Category 2, the unrepresented claimants should be required to pay to petitioners that portion of the award which would normally be allocated against those litigants. In other words, petitioners are entitled to recover $610,502.81 from the Category 2 litigants, and the latter are entitled to recover at least this same amount from the unrepresented claimants for the benefits that the attorneys for such litigants conferred on such claimants in the creation of the fund.[33] Thus, it is equitable to charge the unrepresented claimants for the full amount that would otherwise be allocated against the Category 2 litigants.

Under such an allocation, the total fees to be paid by the unrepresented claimants amount to $925,968.61.[34] Such sum is less than 12% of the $8,145,400 to be distributed to them. This group of claimants can hardly claim that this allocation is unfair when all other claimants in this litigation are paying from 20% to 40% of their recoveries as attorneys' fees.

VI

Conclusion

For the reasons stated, this Court finds and concludes that attorneys' fees in the amount of $925,968.61 should be paid to petitioners from the portion of the settlement fund distributable to the unrepresented claimants. This Court's findings of fact and conclusions of law are embodied in the foregoing opinion, whether or not expressly so characterized. Petitioners are directed to submit an appropriate Order.

In re HOTEL TELEPHONE CHARGES.*

No. 73-1107.

United States Court of Appeals,
Ninth Circuit.
June 19, 1974.

Antitrust action alleging a nationwide conspiracy among hotel chains to increase room rates in violation of federal antitrust laws and state laws. The United States District Court for the Central District of California, Malcolm M. Lucas, J., permitted the actions to be maintained as a class action, and defendants appealed. The Court of Appeals, Ely, Circuit Judge, held that class action treatment was not proper where common questions did not predominate over individual questions, and where class action

Corp.; Hicks v. Hilton Hotels Corp.; Colson v. Hilton Hotels Corp. (five cases); Colson v. Hotel Waldorf-Astoria Corp.

was not the superior method of adjudication.

Reversed.

See also, Jud.Pan.Mult.Lit., 341 F. Supp. 721, 374 F.Supp. 1402.

1. **Federal Civil Procedure ⇐161**

Class action treatment may be unsuitable in a fraud case if there are material variations in the representations made or in the kinds or degrees of reliance by plaintiffs. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

2. **Federal Civil Procedure ⇐181**

Antitrust action against hotels, alleging a nationwide conspiracy involving approximately 600 individual hotels to increase room rates by means of telephone surcharges in violation of federal antitrust laws and state laws, did not qualify for class action treatment where common questions did not predominate over individual questions, in that, inter alia, in order to substantially establish each hotel's involvement in a conspiracy each hotel's knowing participation would be a requisite element of proof, and where, furthermore, since telephone surcharges varied from hotel to hotel, the amount of each defendant's surcharge would necessarily require individual treatment. Fed.Rules Civ.Proc. rule 23(b)(3), 28 U.S.C.A.

3. **Federal Civil Procedure ⇐161**

Conditional certification is not a means whereby a district court can avoid deciding whether, at that time, the requirements of rule relating to class actions have been substantially met; the purpose of conditional certification is to preserve the court's power to revoke certification in those cases wherein the magnitude or complexity of the litigation may eventually reveal problems not theretofore apparent. Fed.Rules Civ. Proc. rule 23, 28 U.S.C.A.

4. **Federal Civil Procedure ⇐181**

Desirability of allowing small claimants a forum to recover for large-scale antitrust violations does not eclipse the problem of unmanageability in a class action. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

5. **Federal Civil Procedure ⇐181**

Class action device, in antitrust action against hotel chains whose members totaled approximately 600 individual hotels, seeking to recover for alleged antitrust violations in relation to telephone rates, was not a superior method of adjudication in view of fact that the proposed action, which might include 40 million individual plaintiffs, was likely to consume decades of judicial time, where average individual recovery in the case was estimated to be only two dollars, and where, even trebled, the amount of recovery would be entirely consumed by the costs of notice alone. Fed.Rules Civ.Proc. rule 23(b)(3), 28 U.S.C.A.

6. **Federal Civil Procedure ⇐161**

Whenever the principal, if not the only, beneficiaries to a class action are to be the attorneys for the plaintiffs, and not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

7. **Monopolies ⇐28(1.6)**

Congressional scheme in relation to antitrust matters does not contemplate that private attorneys are to act as prosecutors to force antitrust violators to disgorge their illegal profits in the general interest of society at large.

E. Judge Elderl in (argued), of Brobeck, Phleger & Harrison, San Francisco, Cal., for appellants.

Joseph W. Cotchett (argued), of Cotchett & Hutchinson, San Mateo, Cal., for appellee.

OPINION

Before ELY, TRASK, and WALLACE, Circuit Judges.

ELY, Circuit Judge:

This appeal is from an Order allowing the appellees' consolidated actions to be

maintained as a class action under Rule 23, Federal Rules of Civil Procedure. Permission to appeal the interlocutory Order was granted pursuant to 28 U.S.C. § 1292(b).

The first action in this case was filed in the Central District of California, and shortly thereafter, ten similar actions were filed in nine other districts. The Judicial Panel on Multi-District Litigation ordered the consolidation of all the actions in the Central District of California. The complaints allege a nationwide conspiracy among forty-seven hotel chains and approximately six hundred individual hotels to increase room rates in violation of federal antitrust laws and state laws. The appellants allegedly acted in concert to add a surcharge for telephone services to the quoted room rate. The appellees further alleged that such a charge, generally amounting from one to three percent of the quoted room rate, was labeled a tax or otherwise confusingly mislabeled.[1] On the basis of these allegations, the appellees seek recovery for themselves and for all other hotel guests similarly surcharged, a class consisting of an estimated forty million persons. The parties agree that the claim of the average class member would be about $2.00 per person in the event of recovery. Settlements on behalf of the class have been reached with a few of the defendants, and settlement orders setting out the terms of the agreements and providing for their submission to the class have been entered in the Northern District of Illinois.

Here, the controlling issue is whether the District Court correctly applied Rule 23(b)(3) in determining that the actions were appropriate for class action treatment. Rule 23(b)(3) requires that common questions of law or fact predominate over any individual questions, and that a class action be superior to other available methods for the fair and efficient adjudication of the controversy. While these two requirements are to some extent interrelated, they are not co-extensive and each requirement must be met. *See* LaMar v. H. & B. Novelty Loan Co., 489 F.2d 461 (9th Cir., 1973). We are firmly convinced that, in these cases, the appellees did not make an adequate showing of proof as to either element of Rule 23(b)(3).

I. *Common Questions Do Not Predominate Over Individual Questions*

Two types of claims have been brought by the appellees: (1) claims that the appellants conspired to violate the federal antitrust laws; (2) pendent state claims primarily based on statutory or common law fraud.

The state fraud claims raise individual issues as to whether each of the six hundred hotels falsely represented or concealed the nature of the charge, as to individual reliance on any alleged misrepresentation, and as to the specific amount of damage suffered by each member of the class as the result of the alleged misrepresentation. The appellees argue that these individual questions can be conveniently dealt with by allowing them to recover if it is proved that the appellants did participate in a "fraudulent scheme," thereby fusing the separate elements of a fraud action into a single conspiracy issue. That same argument was made in Cotchett v. Avis Rent-A-Car System, Inc., 56 F.R.D. 549 (S.D.N.Y.1972), a case which also involved an alleged conspiracy fraudulently to impose a surcharge on customers. In *Cotchett* the court wrote:

> ". . . [T]he second, third, and fourth stated claims . . . allege active concealment, failure to disclose, fraud, and reliance. . . . [T]hese allegations raise such individualized questions of law and of fact as to overwhelm whatever kernel of common issues might be involved; with

1. While appellees alleged that all the appellants sought to disguise the surcharge as a local tax, they then further alleged that the charges were variously labeled "Tx Tms", "Rm Tx", "Sundries", "Misc.", "In Tms", or "GMS." Moreover, some defendants charged a flat fee, while others charged varying percentages of the room rate.

500,000 to 1,500,000 plaintiffs and over 100 (not all as yet identified) defendants, involving individual dealings, the questions of knowledge of the surcharge, reliance on the alleged misrepresentation, methods of concealment, and failure to disclose to each plaintiff, an adjudication of the 'common' question of conspiracy would not advance matters very far at all." *Id.* at 552.

[1] Our case involves millions more plaintiffs, hundreds more defendants, and an even greater variety of alleged misrepresentations and surcharge amounts than *Cotchett, supra.* Without eliminating or eroding the traditional or statutory elements of a fraud action, there is no possibility that common questions can predominate over individual ones in these claims. *See* Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966), wherein the Committee noted that a class action treatment may be unsuitable in a fraud case if there are material variations in the representations made or in the kinds or degrees of reliance by the plaintiffs. *See also* Simon, Class Actions—Useful Tool or Engine of Destruction, 55 F.R.D. 375 (1972).

[2] The appellees' Sherman Act claims, while charging hundreds of hotels with similar conduct, nonetheless raise individual questions that could require decades of litigation. The appellees' allegation that a conspiracy existed to violate the antitrust laws does not insure that common questions will predominate. Advisory Committee's Note, *supra* at 103. In order substantially to establish each hotel's involvement in a conspiracy to violate the antitrust laws, each hotel's knowing participation would be a requisite element of proof. Furthermore, since the surcharges varied from hotel to hotel, the amount of each defendant's surcharge would necessarily require individual treatment, as would the period in which each hotel's surcharge was in effect. And while the amount of each hotel's surcharge might constitute prima facie evidence of the amount of damage, the appellants might rebut that evidence by showing what the cost of each hotel's telephone service charge would have been in a competitive market. *See* Pollack, The "Injury" and "Causation" Elements Of a Treble Damage Antitrust Action, 57 Nw.L.Rev. 691, 692 (1963); Timberlake, The Legal Injury Requirements And Proof of Damages In Treble Damage Actions Under The Antitrust Laws, 30 Geo.Wash.L. Rev. 231 (1961–62). For a discussion of the statutory limitations within which plaintiffs must establish their damages, see Malina, Fluid Class Recovery As a Consumer Remedy In Antitrust Cases, 47 N.Y.L.Rev. 477, 492 (1972). After the basis for computing damages had been individually determined for each defendant, each member of the class seeking recovery would then be required to prove that he patronized the hotel while the surcharge was in effect and that he absorbed the cost of the surcharge. Furthermore, it would then be necessary to compute the amount of damages due the class member. In a class of forty million, assuming only ten percent of these unknown class members came forward with claims, and assuming the proof of each claim required only ten minutes, approximately one hundred years would yet be required to adjudicate the claims. Unless the court is to allow the procedural device of the class action to wear away the substantive requirements to maintain a private antitrust cause of action, this suit raises far too many individual questions to qualify for class action treatment.

The appellees have argued that many of the individual questions arising from the damage claims can be solved by allowing damages in the form of fluid recovery, relying on Bebchick v. Public Utilities Commission, 115 U.S.App.D.C. 216, 318 F.2d 187 (1963), cert. denied 373 U.S. 913, 83 S.Ct. 1304, 10 L.Ed.2d 414 (1963); In Re Antibiotics Antitrust Actions, 333 F.Supp. 278 (S.D.N.Y. 1971); and Daar v. Yellow Cab Co., 67 Cal.2d 695, 63 Cal.Rptr. 724, 433 P.2d

732 (1967). Both *Bebchick* and *Daar* are inapposite, as neither case involved a statutory basis for recovery as do the federal antitrust laws. Furthermore, *Bebchick* was not even brought as a class action, and *Daar* arose under a state class action statute with requirements that differ from Rule 23. As for *In Re Antibiotic Antitrust Actions*, that case involved the approval and administration of a settlement by the District Court, rather than the actual recovery of gross damages for the class as a whole. We agree with the decision reached in Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), that allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights under the antitrust statutes. Such enlargement or modification of substantive statutory rights by procedural devices is clearly prohibited by the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure.

[3] The District Court in this case has relied on the "imagination" of appellees' counsel to provide solutions that will, at some point in the future, prevent these individual issues from splintering the action into thousands of individual trials requiring years to litigate. Thus far the appellees have not been able to demonstrate to our satisfaction that the individual questions will not overwhelm the common questions, unless some of the required elements or allowed defenses in respect to the alleged claims are eliminated or impaired. The issues raised by the apparent existence of numerous individual questions must be resolved before a class is certified, even if certification is conditional. Conditional certification is not a means whereby the District Court can avoid deciding whether, at that time, the requirements of the Rule have been substantially met. The purpose of conditional certification is to preserve the Court's power to revoke certification in those cases wherein the magnitude or complexity of the litigation may eventually reveal problems not theretofore apparent. But in this case the District Court seemed to brush aside one of the requirements of Rule 23(b)(3) by stating that at this time "analysis of the individual versus common question issue would be for the Court to act as a seer." However difficult it may have been for the District Court to decide whether common questions predominate over individual questions, it should not have sidestepped this preliminary requirement of the Rule by merely stating that the problem of individual questions "lies far beyond the horizon in the realm of speculation."

II. *The Present Class Action Is Not the Superior Method of Adjudication.*

In attempting to satisfy the second requirement of Rule 23(b)(3), the appellees argue that maintaining individual actions is not economically feasible in this case. They contend that the suit must therefore proceed as a class action, regardless of its unmanageability. Furthermore, they maintain that if they are not allowed to proceed with their class action suit, the appellants will go "unpunished" for their alleged antitrust violations.

[4–6] Despite the appellees' arguments, the desirability of allowing small claimants a forum to recover for large-scale antitrust violations does not eclipse the problem of unmanageability. Eisen v. Carlisle & Jacquelin, *supra*. Some actions have been dismissed on the basis of manageability problems alone, particularly in cases involving large numbers of plaintiff class members. *See* Schaffner v. Chemical Bank, 339 F.Supp. 329 (S.D.N.Y.1972); City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971). In structuring this suit to include over six hundred defendants[2]

2. The appellees allege a far wider conspiracy than heretofore alleged in massive class actions. *See* Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y.1971) (two alleged conspirators); West Virginia v. Chas. Pfizer & Co., 314 F.Supp. 710 (S.D.N.Y.1970) (six

and millions of plaintiffs, the appellees have virtually insured that the litigation would be intolerably time-consuming and, because of the legal nature of the claims, involve a great variety of individual questions. As the Court noted in Morris v. Burchard, 51 F.R.D. 530, 535 (S.D.N.Y.1971), "It cannot be lightly overlooked that as a class gets larger it may transform a litigation into a gigantic burden on the Court's resources beyond its capacity to manage or effectively control." *See* Hackett v. General Host Corp., 1972 Trade Cases ¶ 73,879 (E.D.Pa.1970), app. dismissed, 455 F.2d 618 (3d Cir. 1972), cert. denied 407 U.S. 925, 92 S.Ct. 2460, 32 L.Ed.2d 812 (1972); United Egg Producers v. Bauer International Corp., 311 F.Supp. 1375 (S.D.N.Y.1970); Ward v. Luttrell, 292 F.Supp. 165 (E.D.La.1968); Simon, Class Actions—Useful Tool or Engine Of Destruction, *supra*. In light of the fact that the proposed class action is likely to consume decades of judicial time, the potential benefit to the class should be carefully weighed against the burden the actions would place upon the federal courts. The average individual recovery in this case is estimated to be only two dollars. Even trebled, the amount of recovery would be entirely consumed by the costs of notice alone.[3] Nor could such administrative costs be minimized by notice by publication or random notice, since the individual class members are known and their addresses available in the appellants' records, thus requiring actual notice. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), Eisen v. Carlisle & Jacquelin, *supra*. In view of the nonexistent, or miniscule, recoveries that are likely to accrue to the supposedly intended beneficiaries, it is not surprising that most of the named plaintiffs are attorneys acting as counsel for themselves. Considering that this action has been primarily generated and financially supported by the lawyers who possibly stand to realize astronomical fees, and not by the individuals whose potential claims in any event are *de minimis*, we find the Court's conclusion in Berley v. Dreyfus Co., 43 F.R.D. 397, 398 (S.D.N.Y.1967) applicable here:

> ". . . we think that subparagraph (b)(3) read as a whole reflects a broad policy of economy in the use of society's difference-settling machinery. One method of achieving such economy is to avoid creating lawsuits where none previously existed. This is in part why 'the extent and nature of any litigation . . . already commenced' is pertinent to the required finding. If a class of interested litigants is not already in existence the court should not go out of its way to create one without good reason." (Footnotes omitted.)

Whenever the principal, if not the only, beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute. *See* Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26 (S.D.N.Y.1972); Cotchett v. Avis Rent-A-Car System, Inc., 56 F.R.D. 549 (S.D.N.Y. 1972).

[7] The appellees' attorneys have asserted that burdening the already strained judicial resources with this class action, which promises no real benefit to class members, is nonetheless jus-

alleged conspirators); In Re Antibiotic Antitrust Actions, 333 F.Supp. 278 (S.D.N.Y. 1971) (five alleged conspirators); Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D.Minn.1968) (six alleged conspirators); Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J.1971) (twelve alleged conspirators); Illinois v. Harper & Row Publishers, Inc., 301 F.Supp. 484 (N.D.Ill.1969) (eighteen alleged conspirators).

3. In Cherner v. Transitron Electric Corp., 201 F.Supp. 934 (D.Mass.1962), distribution costs in administering the damage fund were $25.47 per claimant, excluding attorneys' fees, and $33.80 per claimant including those fees. *See* Comment, Managing the Large Class Action, 87 Harv.L.Rev. 426, 430 n. 31 (1973).

tified on the ground that allowing the suit will serve to "punish" and "deter" antitrust violations. But the Congressional scheme does not contemplate that private attorneys are to act as prosecutors to force antitrust violators to disgorge their illegal profits in the general interest of society at large. The antitrust laws focus on the compensation of parties actually injured, presupposing that a plaintiff can prove that he was in fact injured as a proximate result of an antitrust violation. Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). The fact that the injured plaintiff is allowed treble damages does not change the basic nature of the private antitrust action as an action intended to compensate. When, as here, there is no realistic possibility that the class members will in fact receive compensation, then monolithic class actions raising mind-boggling manageability problems should be rejected. If, as appellees maintain, the suit would not be litigated except as a class action which would provide plaintiffs' attorneys with lucrative incentives, then "that decision of the legal marketplace may be the best reflection of a public consciousness that the time of the lawyers and of the court should best be spent elsewhere." Hackett v. General Host Corp., *supra*, 455 F. 2d at 626. We agree with the Second Circuit's observation in Eisen v. Carlisle & Jacquelin, *supra*, that it is for the Congress to provide a solution if existing remedies do not adequately compensate consumers damaged by individually small, but illegal, charges. Judges should not significantly tamper with legislative enactments simply to satisfy their own individual notions as to sound public policy.[4]

In view of the following factors: (1) the predominance of individual questions over common questions; (2) the unmanageability of the litigation in terms of time, administrative costs, and complexity; (3) the minimal recovery it promises the potential individual class members; and (4) the initiation and financial maintenance of the suits primarily by attorneys acting in a dual capacity as named plaintiffs and counsel for the plaintiffs, we hold that the requirements of Rule 23 have not been met and that, consequently, the District Court's class certification was erroneous. Our conclusion in this respect renders it unnecessary to reach other issues presented in the appeal.

Reversed.[5]

4. As we stated in In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 130 (9th Cir. 1973):

> "Insofar as the common weal was injured the federal government was the proper party to seek redress . . . . If the Government did not prosecute its action with sufficient vigor, the remedy lies in executive or legislative reform, not in judicial overreaching."

Richard KLINE et al.,
Plaintiffs-Appellees,

v.

COLDWELL, BANKER & CO., Realtors, et al., Defendants-Appellants.

No. 73-2169.

United States Court of Appeals, Ninth Circuit.

Dec. 20, 1974.

An action was brought on behalf of all sellers of real estate in Los Angeles County against the Los Angeles realty board, its several divisions, and 32 named real estate brokers representing a class consisting of all brokers who were board members during the four-year period prior to the filing of the action, charging that the defendants conspired, in violation of the Sherman Act, to fix brokerage commissions through the distribution of a recommended fee schedule to the members. An interlocutory appeal was taken by defendants from an order of the United States District Court for the Central District of California, William P. Gray, J., granting in part plaintiffs' motion for certification of their suit as a class action. The Court of Appeals, Trask, Circuit Judge, held that the suit was not maintainable as a class action, since, on the question of defendants' illegal conduct, no adequate showing was made that common questions predominated over individual questions, since, in light of the problems engendered by the requirement of proof of damages, a class action was not superior to other available methods for adjudicating the controversy, and since it did not appear that the suit would be manageable as a class action.

Reversed.

Duniway, Circuit Judge, filed a concurring opinion.

1. Federal Civil Procedure ⟹181

Action brought on behalf of all sellers of real estate in Los Angeles County against the Los Angeles realty board, its several divisions, and 32 named brokers representing a class consisting of all brokers who were board members during the four-year period prior to filing of action, charging that defendants conspired, in violation of the Sherman Act, to fix brokerage commissions through the distribution of a recommended fee schedule to the members, was not maintainable as a class action. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

2. Monopolies ⟹28(7.2)

In action brought on behalf of all sellers of real estate in Los Angeles County against Los Angeles realty board and others, charging that the board and its members conspired, in violation of the Sherman Act, to fix brokerage commissions through the distribution of a recommended fee schedule to the members, plaintiffs would have to prove, in order to prevail under the Sherman Act and to recover treble damages under the Clayton Act, that defendants' conduct both contravened the Sherman Act and that plaintiff suffered injury as a direct result of such illegal conduct. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; Clayton Act, § 4, 15 U.S.C.A. § 15.

3. Federal Civil Procedure ⟹181

Neither on a "membership-ratification" theory nor on an "adherence" theory could plaintiffs, who brought suit on behalf of themselves and all sellers of real estate in Los Angeles County against Los Angeles realty board and others, charging that the board and its members conspired to fix brokerage commissions, establish illegal conduct by defendants without individualized proofs, thus precluding plaintiffs from maintaining their suit as a class action. Fed. Rules Civ.Proc. rule 23, 28 U.S.C.A.

4. Monopolies ⟹28(1.7), 29

In order for a member of a trade association to become guilty in a criminal case or liable in a treble damages case under the "membership-ratification" theory, the member must have knowingly, intentionally and actively participated in an individual capacity in the unlawful

scheme. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

5. Monopolies ⟹28(7.5)

In action brought on behalf of all sellers of real estate in Los Angeles County against the Los Angeles realty board and others, charging that the board and its members conspired, in violation of the Sherman Act, to fix brokerage commissions through the distribution of a recommended fee schedule to the members, proof that the board prepared a suggested commission schedule and distributed it to its members would not establish the illegal conduct necessary for a recovery against all defendants on a "membership-ratification" theory. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

6. Monopolies ⟹17(1.7)

For there to be a per se violation of the Sherman Act, there must be a price-fixing agreement and adherence thereto or consensual approval. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

7. Monopolies ⟹28(7.5)

In action brought on behalf of all sellers of real estate in Los Angeles County against the Los Angeles realty board and others, charging that the board and its members conspired to fix brokerage commissions, proof of conspiracy or proof of illegal conduct of each defendant could not be accomplished by generalized means, i. e., on a "membership-ratification" theory or on an "adherence" theory. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

8. Monopolies ⟹28(7.5)

Mere parallelism, in respect to the setting of fees by real estate brokers, does not conclusively establish Sherman Act liability. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

9. Monopolies ⟹28(7.6)

Proof of injury is an essential substantive element of a successful treble damages antitrust action. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; Clayton Act § 4, 15 U.S.C.A. § 15.

10. Federal Civil Procedure ⟹181

Although the amount of recovery in a lawsuit is not ordinarily of concern where a wrong has been inflicted and an injury suffered, it was a matter of concern in the instant case, in which 2,000 real estate brokers were attempted to be joined in a class action, and in which each broker could be jointly and severally liable, with their liability increased in geometric progression. Fed.Rules Civ. Proc. rule 23, 28 U.S.C.A.

11. Monopolies ⟹28(9)

Trebling of damages in Sherman and Clayton Act cases is a statutory punitive measure. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; Clayton Act, § 4, 15 U.S.C.A. § 15.

12. Monopolies ⟹28(9)

Intent of Congress, under treble damages provision of the Clayton Act, was to impose punishment upon the violator of Sherman Act's first section for his own malefactions, not to subject him to vicarious liability by the coincidence of a class action for the staggering damages of the multitude. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; Clayton Act, § 4, 15 U.S.C.A. § 15; Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

Carl Schuck (argued), Overton, Lyman & Prince, Los Angeles, Cal., for petitioners L. A. Realty Board and others.

Bridges & Bridges, Los Angeles, for petitioner Lindgren.

Seth M. Hufstedler, Beardsley, Hufstedler & Kemble, Los Angeles, Cal. (argued), for petitioners Coldwell, Banker & Co.

Daniel Fogel, Bodle, Fogel, Julber & Reinhardt, Los Angeles, Cal. (argued), for respondents-appellees.

Before DUNIWAY and TRASK, Circuit Judges, and POWELL,* District Judge.

* Honorable Charles L. Powell, Senior United States District Judge for the Eastern District of Washington, sitting by designation.

OPINION

TRASK, Circuit Judge:

In this proceeding under the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b), we are called upon to decide by means of an interlocutory appeal whether this suit may be maintained as a class action under Rule 23, Federal Rules of Civil Procedure. The action was brought by plaintiffs Richard and Margo Kline, husband and wife, on behalf of themselves and all sellers of residential real estate in Los Angeles County against the Los Angeles Realty Board and its several divisions and 32 named real estate brokers representing a class consisting of all real estate brokers who were members of the Board during the 4-year period prior to the filing of the action.

Plaintiffs allege that the Board and its members conspired in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, to fix brokerage commissions through distribution of a recommended fee schedule to its members. Plaintiffs claim that the fee schedule fixed commissions at a higher rate than it would have been absent the schedule, causing damage to plaintiffs which they are entitled to have trebled under section 4 of the Clayton Act, 15 U.S.C. § 15. During the 4-year period involved, approximately 800,000 deeds were recorded in Los Angeles County. Based upon this fact defendants estimated that upwards of 400,000 sales with approximately that number of plaintiffs could well be involved in this class suit.[1] By virtue of the alleged conspiracy and the damages sustained the plaintiffs prayed for a judgment against the defendants as a class and each of them individually totaling $250 million actual damages trebled to $750 million or according to the proof adduced at trial, together with a reasonable attorney's fee and costs of suit.

More than 2,000 brokers who were members of the Los Angeles Realty Board and its divisions performed services during the 4-year period in the sale of residential property, which is defined as any lot or parcel of real property improved with from 1 to 12 dwelling units. Defendants denied participating in any conspiracy. The defendant Board admitted publishing and distributing a commission schedule but denied that any member was required to follow it. The fee schedule suggested a commission of six percent of the total purchase price. The foreward of the schedule states in part:

> "It should be understood that no member of the Los Angeles Realty Board, or any other Realtor is in any way bound by this Schedule. The amount of the commission on any real estate transaction is a matter for the parties to that transaction and is in no way subject to the control of the Los Angeles Realty Board."

The trial court received a motion for certification of the action as proper under Rule 23. After having considered the motion, the opposition, voluminous supporting documents and filings and after having heard extensive argument, the district court granted the motion in part and denied it in part to the following effect:

(1) The named plaintiffs Richard and Margo Kline, husband and wife, were found to be representative of a class of all persons who sold residential property within Los Angeles County, California, during the period September 24, 1966, to September 23, 1970, and used the services of one or more of the named defendant real estate brokers or brokerage firms or any member of the Los Angeles Realty Board (including its divisions) and compensated said brokers or firms for their services.

(2) The 32 named defendant real estate brokers and brokerage firms together with the Los Angeles Realty Board and its branches were determined to be representative of a defendants' class of all real estate brokers who during the

1. The plaintiffs did not disagree but suggested at oral argument as a word of caution that there might be more.

same period were members of the Los Angeles Realty Board including its branches and who acted in that capacity in connection with the sale of residential real property.

(3) The district court denied Martin Simon status as a representative of a class of "unsuccessful sellers of real property," because it would have been inappropriate under Rule 23.

(4) The court also denied representative status to sellers of commercial and industrial property.

The court's two findings of representative status were based in part on its determination that the central issue concerned whether there was a conspiracy entered into by the defendants to fix prices for commissions in sales of residential real property in Los Angeles County. This issue, the court found, presented common questions of law and fact which predominated over any questions of law and fact affecting only individual members of the classes. A subissue, ruled the court, was whether there was a schedule of commissions prepared, published and distributed by the defendants and whether said schedule was substantially adhered to by the broker defendants. This central and subissue should not have to be tried on more than one occasion, said the court, and although individual issues did exist such as whether the individual brokers knew of the schedule and whether they conformed to it, these individual issues did not predominate over the common issues of law and fact. The court having concluded that its order involved a controlling question of law as to which there was a substantial ground for difference of opinion, certified it for immediate appeal under 28 U.S.C. § 1292(b). This court has entered its order permitting the appeal.[2] Defendants appeal the district court's order finding the case to be proper class action.

Without expressly so stating, the parties appear in agreement that whether this is a proper class action is to be determined under Rule 23(b)(3). We are in accord.[3] Rule 23(b) first requires that

2. Although questions were raised as to the application of the Interlocutory Appeals Act to the order of the trial court certifying the appeal as an interlocutory one, those questions were briefed by counsel on both sides and the order granting permission to submit an interlocutory appeal was granted by another panel of this court. We do not further examine that question.

3. Rule 23(b) states in pertinent part:

"(b) . . . An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . . .

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

As originally enacted, Rule 23 would not have accommodated a suit like that filed here. It provided only for a "true class suit" in which, but for the rule, the joinder of all interested persons would have been essential, 3B J. Moore, Federal Practice ¶ 23.08 (1974); the "hybrid" class suit where the interests of the parties were several but concerned a specific property, *id.* ¶ 23.09; and the "spurious" class suit where there was no jural relationship between the parties but a common question of law or fact existed. Such an action was an invitation to those having such an interest to join but not a requirement that they accept. *Id.* ¶ 23.10. The importance of Rule 23 at this time was not outstanding. In 1966 the rule was amended to provide a more flexible remedy. Recoveries would be available for or on behalf of all members of the class and the judgments binding upon all provided the requirements of the rule were met. The popularity of class actions increased fourfold within a period of 4 years and developed a host of champions and critics. Compare Blecher, Is the Class Action Rule Doing the Job? (Plaintiff's viewpoint), with Simon, Class Actions—Useful Tool or Engine of Destruc-

the prerequisites of Rule 23(a) must be satisfied. They are (1) that the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. The propriety of the certification of both plaintiff and defendant classes and of the class action in general must be measured against these requirements.

[1] It appears clear that prerequisites (1) and (2) are satisfied by both classes, and no question has been raised as to the adequacy of representation under (4). Although Mr. and Mrs. Kline represent some 400,000 sellers, they are sellers who have employed one of the defendant class members: there are 32 named brokers and brokerage corporations as well as the Los Angeles Realty Board and its branches as defendants, and it can well be assumed that the other 2,000 defendants are adequately represented by them. Whether the claims or defenses of the representatives of the named parties are typical of all the claims and defenses of the absent members of the two classes will be considered under subsection 23(b)(3), since to a considerable extent the criteria are similar. We consider, then, the additional requirements of Rule 23(b)(3): (1) whether common questions predominate over individual ones; and, (2) whether the action is "manageable."

I. *Whether the Questions of Law or Fact Common to the Members of the Class Predominate Over Any Questions Affecting Only Individual Members.*

The crux of defendants' argument is that individual questions concerning the liability of each individual broker defendant and the injury of each individual plaintiff predominate over any common questions of a conspiracy. The plaintiffs adversely contend that they can prevail on a legal theory which avoids individualized issues of defendant liability, which establishes plaintiff injury in general, and which leaves the determination of the *quantum* of individual recovery to a mechanical process or to separate adjudication. In short, appellees argue that they can prevail on a *generalized* antitrust theory (utilizing "per se" rules) while the appellants deny this and argue that individual issues must be litigated. Resolution of this controversy requires an examination of substantive antitrust law.

[2] In order to prevail under section 1 of the Sherman Act, 15 U.S.C. § 1, and to recover treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, the plaintiffs must prove both that the defendants' conduct contravened section 1

tion, 55 F.R.D. 365, 375 (1973). The courts have had their own difficulties in solving the problems generated by the rule. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035, 87 S.Ct. 1487, 18 L.Ed.2d 598 (1967) (Eisen I); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (Eisen II); and Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), vacated, 416 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (Eisen III).

The Supreme Court at the last term, October 1973, passed upon two cases involving the scope of class actions. Zahn v. International Paper Co., 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), held that a diversity action seeking damages could not be maintained on behalf of unnamed plaintiffs whose claims did not meet the jurisdictional amount requirements. Eisen v. Carlisle & Jacquelin, 416 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), upheld the decision of the Court of Appeals in Eisen III, *supra*, that individual notice must be given to all identifiable members of the class at the plaintiff's expense and that a preliminary or "mini-hearing" on the merits to determine whether it might be maintained as a class action was improper.

Our own court has had more than one occasion to consider the problems of Rule 23 as amended. Most recently we have had before us La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973), and In Re Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974).

and that the plaintiffs suffered injury as a direct result of this illegal conduct.[4] Each of these two facets will be separately considered.

A. *Establishing illegal defendant conduct.*

[3] The appellees advance two theories under which they contend that they can establish illegal conduct without individualized proofs. Both theories are based upon trade association practices and can be called the "Membership-Ratification" theory and the "Adherence" theory. The former relies heavily upon Phelps Dodge Refining Corp. v. FTC, 139 F.2d 393, 396–397 (2d Cir. 1943), which stated:

> ". . . [T]he issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to disassociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise and cannot disclaim joint responsibility for the illegal uses to which the association is put."

Since *Phelps Dodge* the "Membership-Ratification" theory has been reformulated by numerous courts including this circuit. In each of these reformulations much of the stress falls upon the knowledge component. In Riss & Co. v. Association of American Railroads, 187 F.Supp. 306, 312–313 (D.D.C.1960), the court said:

> "The individual . . . members of the associations can be held responsible for the unlawful conspiratorial acts or declarations of the associations only if they are shown *to have known and approved of such activities and of their unlawful objectives.*" (Emphasis added.)

In Vandervelde v. Put & Call Brokers & Dealers Association, Inc., 344 F.Supp.

4. 15 U.S.C. § 1 states:

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding provisions shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

15 U.S.C. § 15 states:

§ 15. Suits by persons injured; amount of recovery

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

118, 155 (S.D.N.Y.1972), it was recently stated:

"The key element of proof for linking an Association member to the acts of his organization is a showing that *he knew of and condoned the act in issue.*" (Emphasis added.)

[4] This court considered the issue in Northern California Pharmaceutical Association v. United States, 306 F.2d 379 (9th Cir.), cert. denied, 371 U.S. 862, 83 S.Ct. 119, 9 L.Ed.2d 99 (1962). That was a criminal case. The indicted defendants were the association, an incorporated California trade association, and one Donald Hedgpeth. The members themselves were not parties to the proceeding as defendants and to this extent the case becomes dissimilar. Hedgpeth, a pharmacist, prepared a price schedule for noncompounded prescriptions which the corporation distributed to its members. In connection with the evidence required to convict the two defendants who were indicted the court said:

"The co-conspirators are the Association as an active and independent legal entity, its officers, directors and committeemen insofar as they have carried on proscribed conduct, and those members of the Association who have *knowingly, intentionally and actively participated in an individual capacity in the scheme* which is said to result in the unlawful conspiracy. Thus, to the limited extent that it carries on unlawful activity, the Association is itself a sort of continuing agreement by which the fixing of prices might be effectuated. *This does not mean,* however, that *every member of the Association, by reason of his membership alone, becomes a co-conspirator.* Knauer v. United States, 237 F. 8, 19–20 (8th Cir. 1916). Knowledge and participation are required. Nor will proof of parallel business behavior alone conclusively establish agreement. Theatre Enterprises v. Paramount, 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954)." Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379, 388–389 (9th Cir.), cert. denied, 371 U.S. 862, 83 S.Ct. 119, 9 L.Ed.2d 99 (1962). (Footnotes omitted.) (Emphasis added.)

It thus clearly appears that in order for a member of a trade association to become guilty in a criminal case or liable in a treble damage case he must have "knowingly, intentionally and actively participated in an individual capacity in the scheme."

Plaintiffs' reliance upon this case and Plymouth Dealers' Association of North California v. United States, 279 F.2d 128 (9th Cir. 1960), to prove liability by continued membership is mistaken. In *Plymouth Dealers' Association* the action was a criminal prosecution against the association, a corporation. There, again, the court approved instructions which required the jury in order to convict to find that there was an agreement "that the defendant should formulate retail list prices for Plymouth motor cars" and "that the price schedules so agreed upon were a substantial part of the price structure used in the sale of Plymouth motor cars." *Id.* at 130 n. 3. But the court in speaking of "the defendant," was referring only to the indicted corporate defendant, i. e., the Dealers' Association. The liability vel non of the association members was not in issue because they were not defendants although they were described as co-conspirators. Nor is there any indication from the opinion that the dealer members were parties in any agreement.

[5] We would read *Plymouth Dealers' Association* as elaborated by *Northern California Pharmaceutical Association* as establishing the law of this circuit that the printing of a price schedule and its distribution to members is not enough to establish civil or criminal liability. Proof here, therefore, even by admission of the Realty Board that it prepared a suggested commission schedule and distributed it to its members does not establish the illegal conduct necessary for a recovery.

[6] Plaintiffs also rely heavily upon United States v. National Association of Real Estate Boards, 339 U.S. 485, 70

S.Ct. 711, 94 L.Ed. 1007 (1950). In that action the Supreme Court stated:

> "The Board's code of ethics provides that 'Brokers should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates.' Members agree to abide by this code." 339 U.S. at 488, 70 S.Ct. at 714.

There is no evidence here of such an ethic or such an agreement. The Court went on to say:

> "Price-fixing is *per se* an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. *An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price*, is itself illegal under the Sherman Act, no matter what end it was designed to serve. Id. at 489, 70 S.Ct. at 714. (Emphasis added.)

Thus, the *Real Estate Boards* case would appear to require for a *per se* violation by members (1) an agreement and (2) adherence or consensual approval. In fact, the Court declined to reverse a district court's finding that two of the defendants, the National Association and one Herbert Nelson, were not participants in the conspiracy upon the basis that the code of ethics of the National Association, that the fee schedule "should be observed," was somewhat ambiguous. Said the Court, "it may be advisory only." *Id.* at 495.

[7] So we cannot be persuaded that in this case proof of conspiracy or proof of illegal conduct of each defendant may be accomplished by generalized means. The legal significance of the written document and the rules or bylaws of the Realty Board and the method of compiling the document may indeed be a question of law and fact common to all defendants. But membership liability is inherently an individual question. It cannot be answered by generalized "Membership-Ratification" (mere continuation of membership) of any type suggested by appellees.

[8] Plaintiffs have also misused the "Adherence" theory. Under this approach if Broker A receives the fee schedule and follows it in his pricing, Broker A would be liable as having adhered to the conspiracy. The fact that Broker A has adhered does not, however, prove that Broker B did so. Nor does the fact that a "substantial" number of brokers adhered prove that Broker B did so also. None of the cases cited by appellee establishes that mere parallelism conclusively establishes liability. *Northern California Pharmaceutical Association, supra,* holds to the contrary. Once again, this issue involves individual questions and necessarily invites individual defenses. Each defendant is clearly entitled to come forward and prove that he did not know of the commission schedule or that he opposed it or ignored it or, perhaps, some other yet unknown defense.

On the question of the defendants' illegal conduct no adequate showing has been made that the questions of law or fact common to the members of the class predominate over the questions affecting individual members.

B. Establishing the plaintiffs' injury, i. e., the damages issue.

[9] In order to certify the action as a proper class action it is necessary to demonstrate that the class action is superior to other available methods for the fair and efficient adjudication of the controversy as required by Rule 23(b)(3). Proof of injury is an essential substantive element of the successful treble damage antitrust action. Gray v. Shell Oil Co., 469 F.2d 742, 748 (9th Cir. 1972), cert. denied, 412 U.S. 943, 93 S.Ct. 2773, 37 L.Ed.2d 403 (1973); Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc., 346 F.2d 1012, 1014 n. 1 (9th Cir.), cert. denied, 382 U.S. 958, 86 S.Ct. 433, 15 L.Ed.2d 362 (1965). Here there was apparently no showing made in support of the question whether "economic reality" might dictate that this action proceed as a class action or not at all. Eisen v. Carlisle & Jacquelin, 416 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

The matter is not discussed in the briefs. The prayer for estimated damages indicates that in many instances the damages if recoverable would be substantial. The fact that sales of 12-unit complexes are included in the disputed transactions also points in that direction.[5] Thus the potential benefit to the proposed class by the use of Rule 23 does not rise to the same dimension as those where the damage award sought is only $70. Eisen v. Carlisle & Jacquelin, *supra*, or $2, In re Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974). It is also entirely probable that a goodly number of the total transactions would not be litigable for one reason or another;[6] and, of course, some of the larger brokers and brokerage firms could reasonably be expected over the 4-year period to have a substantial number of residential transactions which would be involved in a single action against that one defendant; and finally, some of the absentee plaintiffs might not desire to become involved in the litigation at all.

[10] The allegation is that from the 400,000 to 800,000 transactions during the period in question damages will be proved in excess of $250 million which trebled will aggregate $750 million. In addition, plaintiffs are asking for costs and attorneys' fees. All of these elements of recovery are within the provision of 15 U.S.C. § 15. The amounts are staggering. In addition, the prayer is for recovery against the defendants jointly and severally. State of Washington v. American Pipe & Construction Co., 280 F.Supp. 802 (S.D.Cal.) mandamus denied sub nom., American Pipe & Construction Co. v. Pence, 393 F.2d 568 (9th Cir.) (unrelated issue), cert. denied, 393 U.S. 842, 89 S.Ct. 122, 21 L.Ed.2d 113 (1968). This means that the small individual operator faces a potential liability of upwards of three-quarters of a billion dollars for which all of his or her assets are responsible. The amount of a recovery in a lawsuit is not ordinarily of concern where a wrong has been inflicted and an injury suffered. But when 2,000 are joined in an action in which each is jointly and severally liable, the liability is increased in geometric progression. Such an award against each of 2,000 real estate broker defendants would shock the conscience.

In somewhat similar circumstances, class actions have sought outrageous amounts in statutory penalty cases such as the $100 minimum under the Truth in Lending Act of 1968. Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y.1972) (aggregate of $13 million sought); Shields v. First National Bank of Arizona, 56 F.R.D. 442 (D.Ariz. 1972) (aggregate of $100 million sought); Alsup v. Montgomery Ward & Co., 57 F.R.D. 89 (N.D.Cal.1972) (aggregate of $20 million sought in one consolidated case and $8 billion in another); Gerlach v. Allstate Insurance Co., 338 F.Supp. 642 (S.D.Fla.1972) (aggregate of approximately $1 billion sought). In each case cited the district court denied class action treatment. Judge Frankel in *Ratner* among other reasons stated:

> "Briefly, if perhaps too broadly, stated, the reasons against maintenance of this as a class action are:
>
> "(1) there is no affirmative need or justification for such a proceeding in the actual circumstances of the case; and
>
> "(2) the allowance of thousands of minimum recoveries like plaintiff's would carry to an absurd

5. Assuming 400,000 transactions causing damage by excess commissions in the estimated sum of over $250 million the average recoverable damage amounts to $625. Trebled, the individual recovery would amount to $1,875 and the aggregate to $750 million the amount of the prayer. To arrive at that average figure, obviously many damage claims have been estimated that would result in a figure considerably in excess of that average. Since attorneys' fees and costs are also recoverable in a successful 15 U.S.C. § 15 action, it may be safely assumed that a great many of the cases could be separately prosecuted.

6. Affidavits of some defendants in the file vehemently assert that they did not follow the Board's suggestions; others may assert other defenses which would make litigation of a claim a poor plaintiff's risk.

and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement." 54 F.R.D. at 414.

This court stated in LaMar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973):

"The clear trend of authority for actions alleging a violation of the Consumer Credit Protection Act . . . holds that class actions are inappropriate."

[11, 12] We find that the same reasoning applies to treble-damage actions under the Sherman and Clayton Acts. Under those statutes compensatory damages must be trebled, Locklin v. Day-Glo Color Corp., 429 F.2d 873, 878 (7th Cir. 1970), cert. denied, 400 U.S. 1020, 91 S.Ct. 582, 27 L.Ed.2d 632 (1971). The trebling of damages in such cases is a statutory punitive measure. As expressed by Judge Learned Hand in Lyons v. Westinghouse Electric Corp., 222 F.2d 184, 189 (2d Cir.), cert. denied, 350 U.S. 825, 76 S.Ct. 52, 100 L.Ed. 737 (1955), ". . . two thirds of the recovery is not remedial and inevitably presupposes a punitive purpose." The intent of Congress under section 4 of the Clayton Act, 15 U.S.C. § 15, appears to have been to impose punishment upon the violator of section 1 of the Sherman Act for his own malefactions not to subject him to vicarious liability by the coincidence of a class action for the staggering damages of the multitude. For example, if the sole enterprise real broker with a small suburban business finds that out of $10,000 in commissions he has earned in the year past, $1,000 has been determined to consist of overcharges for which in an antitrust action, he becomes obligated to pay $3,000 as treble damages. But because he joined a realty board and received and followed suggestions as to proper commissions he is now obligated legally to pay $750 million. At some point the logic of the law leads in this situation to an ad absurdum result. We believe this is it.[7] In the light of the problems engendered by the requirement of proof of damages, we cannot find that under Rule 23(b)(3) this class action is superior to other available methods for the fair and efficient adjudication of the controversy.

II. Manageability of the Action.

The final consideration for class action status involves the question of manageability under Rule 23(b)(3)(D), i. e., "the difficulties likely to be encountered in the management of a class action." This problem was recognized by the Advisory Committee's Notes on the Proposed Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966), where the Committee discussed the types of cases which would generally qualify under the rule. It then by way of reservation pointed out that certain cases would be inappropriate as class actions stating as an example that a mass accident,

". . . resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways."

Here, as the plaintiffs state in their brief, they do not rely upon the "isolated fact of membership" in the Realty Board nor upon "mere conscious parallelism" of the members.

"Rather, plaintiffs rely on a combination of these and other relevant factors: the Los Angeles Realty Board distributes a recommended fee schedule to its members; the members of the Board receive and have knowledge

7. As pointed out in a slightly different context in Green v. Wolf Corp., 406 F.2d 291, 303 (2d Cir. 1968), cert. denied, 395 U.S. 977, 89 S.Ct. 2131, 23 L.Ed.2d 766 (1969):

"Punitive damages can be justified only as retribution or as a deterrent measure. Restatement, Torts § 908, Comment a; The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U.L.Rev. 1159 (1966)."

of the fee schedule and maintain their membership in the Board; and the members of the Board adhere to the 'suggested' fee schedule in fixing their brokerage commissions."

But this is only the plaintiffs' case as to an individual defendant. There are 2,000 defendants. Perhaps such evidence would establish a prima facie case. But the defendant would then have the right to come forward and submit his proof;[8] he may categorically deny some of the proof of the plaintiffs or may submit matter in avoidance. This trial must repeat itself with individual differences some 2,000 times as far as we can discern based upon the pleadings before us now. There are some questions that would need be proved only once such as the distribution of the schedule, but there are other matters which would have to be gone into as many times as there were sales by that defendant during that 4-year period. One jury could obviously not try the facts as to all defendants. There is a serious question whether such ordinary trials could properly be referred to a master. And then, after the case on liability is submitted or tried, the same procedure would have to be followed as to damages.[9] It would appear that generalized treatment would soon fall into individualized law suits. At that point the actions become unmanageable as a class action.

For the foregoing reasons we conclude that the present action is unsuitable for class action treatment. We note that in making this determination we intimate no judgment on the merits.

The judgment of the trial court that the action may be tried as a class action is reversed.

DUNIWAY, Circuit Judge (concurring):

I concur in the judgment, but for somewhat different reasons.

First, I think that this case is controlled by the rationale of our decision in In re Hotel Telephone Charges, 9 Cir., 1974, 500 F.2d 86. That case, like this one, was an antitrust case, involving large classes of potential plaintiffs and defendants. We there held that the case was not a proper one for class action treatment for two reasons: (1) that common questions did not predominate over individual questions (see Rule 23(b)(3), F.R.Civ.P.), 500 F.2d at 88–90; and (2) that the proposed class action was not a superior method of adjudication (see Rule 23(b)(3)), 500 F.2d at 90–92. The facts here are not identical to those in *Hotel Telephone Charges*, but the differences are minor and, in my opinion, not significant enough to make the rationale of that case inapplicable to this one.

Second, I cannot believe that Rule 23, as amended, was intended or should be construed to authorize the kind of judicial juggernaut that plaintiffs and their counsel seek to create here. The plaintiffs Kline have been designated as the representatives of an estimated 400,000 sellers of real property in Los Angeles County, sellers of residential dwellings containing up to twelve units. The Klines sold one residence, in 1970, for $42,500. They paid a commission to one

8. It has been suggested that generalized proof of damages might suffice under Rule 23. But the rule does not eliminate the ultimate need for individual proof of damages by each member of the class. Nor does it foreclose the right of each defendant to assert his defenses before a jury if one is requested.

28 U.S.C. § 2072 states in pertinent part: "The Supreme Court shall have the power to prescribe by general rules, the forms of process . . . and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . .

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." *See* Colgrove v. Battin, 413 U.S. 149, 161, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973); Class Action Symposium, 68 Nw.U.L.Rev. 991, 1049 (1974).

9. Again, generalized proof is suggested, as presumably a witness would testify as to what was a fair commission absent the schedule. But the defendant as to each transaction would be entitled to give his particularized version. The suggested commission schedule by its terms applies to "normal" sales.

broker, Lelah Pierson, of 6%, or $2,550. She is a named defendant. Their theory of damages is that, but for the charged conspiracy, the commission would have been less, but they do not tell us how much less. If we assume that the broker would have done her work for nothing, an obviously improper assumption, their maximum damages would be $2,550, which, trebled, would be $7,650. Realistically, this is a grossly exaggerated figure. Yet the plaintiffs seek to parlay their claim into a lawsuit on behalf of 400,000 sellers, not one of whom, so far as we are advised, except the Sherman plaintiffs, has indicated the slightest interest in suing anyone. The Shermans, too, made but one sale. They paid a 6% commission of $2,700, which was divided between two brokers, neither of whom is named as a defendant. The plaintiffs, by this device, seek to recover from Ms. Pierson, among 2,000 others, $750,000,000 in damages, plus attorneys' fees and costs.

The named defendants are 32 real estate brokers and five associations of real estate brokers. They have been designated as representatives of a class of 2,000 brokers. Only one of the "representative" defendants, Ms. Pierson, ever dealt with the "representative" plaintiffs Kline.

At oral argument, plaintiffs explained how easy it will be for them to identify the members of the respective classes. First, they propose, under the aegis of the court, to compel the defendant associations to furnish them with lists showing the name and address of every broker who was a member of any of them at any time during the four year period preceding the filing of this action. These brokers, estimated at 2,000, will be the class of represented defendants. Next, plaintiffs propose, under the aegis of the court, to compel each of these 2,000 brokers to search his files and supply the name and address of every person who, during the same period, paid the broker a commission on a sale of residential property containing twelve units or less. These persons, estimated at 400,000, will be the class of represented plaintiffs. Plaintiffs do not tell us at whose expense all this is to be done.

Next, notice will be sent to each of the 400,000 represented plaintiffs. I would expect that the Rule 23 notice to each "represented" plaintiff, as prepared by plaintiffs' counsel, would give him a brief description of the nature of the case, and then would tell him (Rule 23(c)(2)(A)) that he can "opt out," but would also tell him that, if he does not opt out, he will incur no financial obligation, while, if the suit is won, he will share in the loot. I wonder if this is proper. Why shouldn't a "represented" plaintiff be told that if he elects to participate in the alleged bonanza, he may, by so electing, subject himself to liability for his share of the costs of suit if the bonanza is not forthcoming? Why should the court offer him a free ride in a case in which the defendants' costs, if they win, may be very large, and will probably not be collectible from the named plaintiffs? Why shouldn't what I have said also apply to plaintiffs' attorneys' fees, unless there is an ironclad agreement by the attorneys that they will collect no fees from anyone if the suit is lost? Rule 23(c)(2)(B) states that the notice shall advise each member of the class that "the judgment, whether favorable or not, will include all members who do not request exclusion." In most cases, one of the incidents of an adverse judgment is liability for costs. No doubt it will be said that the potential liability for costs might cause many represented plaintiffs to opt out. If so, what is so wrong about that? It may also be said that the potential liability is meaningless. How would defendants collect? However, there may be a possible alternative. The real bonanza in a case like this, if it is won, will go to counsel. Perhaps the class action order could be conditioned upon an agreement by counsel that they will pay all costs of all defendants if the suit is lost!

Notice will also go to each of the 2,000 represented defendants. Here I note a peculiarity of Rule 23 that none of the

parties has mentioned. Rule 23(c)(2)(A) requires that the notice to each member of the class must advise him that "the court will exclude him from the class if he so requests by a specified date." I have read and re-read the rule and I can find nothing in it to indicate that this provision is not just as applicable to members of a "class" of defendants as it is to members of a "class" of plaintiffs. The notice, therefore, must tell the represented defendant that he can opt out. What member of a class of defendants who is in his right mind, and who is told that, if he does not elect to be excluded, he may be liable for $750,000,000 plus very large attorneys' fees and costs, will fail to opt out? It seems more than probable that the court, having gone to the trouble and expense of learning the name and address of each potential broker defendant and of devising a proper notice and having it sent out, will wind up with no "class" of defendants, but only those who are named as defendants and are served with process in the ordinary way. Yet this will not simplify the action if the 400,000 "plaintiffs" are brought in as a class. It will still be necessary for each such "plaintiff," if he is to share in the loot, to prove (a) that the broker with whom he dealt, whether the broker has opted out or not, participated in the conspiracy, and (b) that he was damaged by the conspiracy, and what his damages are. Opting out is not the same as defaulting—it confesses nothing. And it must be remembered that plaintiffs have demanded a jury trial.

I venture to suggest that none of the class action features of this case was dreamed up by the named plaintiffs, but that all of them are the brain children of their attorneys. In California, barratry is a crime (Cal.Pen.C. § 158). The Rules of Professional Conduct of the State Bar, authorized by Cal. Bus. and Prof. Code § 6076, provide (Rule 2 § a): "a member of the State Bar shall not solicit professional employment by advertisement or otherwise." Does solicitation cease to be solicitation when done under the aegis of a judge? If so, what has become of the centuries old policy of the law against stirring up litigation? Did the Supreme Court, when it adopted Rule 23, as amended, intend to abrogate that policy for a case like this? I am loath to believe that it did. I also have grave doubt whether such a change in the law, if intended, can properly be called a matter of procedure. In other words, I doubt that the Supreme Court has power, by a procedural rule, to abrogate the policy to which I have referred, assuming that that is what the Court intended.

Perhaps more important is the practical effect of such a suit as this. The burden that it can impose on the court—discovery, pre-trial, notice to the classes, etc., and on a jury, if one is ever empanelled, is staggering. It is inconceivable to me that such a case can ever be tried, unless the court is willing to deprive each defendant of his undoubted right to have his claimed liability proved, not by presumptions or assumptions, but by facts, with the burden of proof upon the plaintiff or plaintiffs, and to offer evidence in his defense. The same applies, if he is found liable, to proof of the damage of each "plaintiff." I doubt that plaintiffs' counsel expect the immense and unmanageable case that they seek to create to be tried. What they seek to create will become (whether they intend this result or not) an overwhelmingly costly and potent engine for the compulsion of settlements, whether just or unjust. Most, though by no means all, real estate brokers are small business men. They cannot afford even to participate in such an action as this, much less to defend it effectively. I suspect, for example, that this is true of Ms. Pierson. It is almost inevitable, if the judge's order is permitted to stand, and even if all potential defendants opt out, that many of the named defendants will settle for whatever amount they can bargain for, and without regard as to whether they are really liable or not, with a good chunk of the money going to plaintiffs' lawyers.

I do not say that the Rule 23(b)(3) class action is always unethical and im-

properly coercive. Doubtless there are circumstances in which it is the only viable means of obtaining relief for classes of truly and actively aggrieved plaintiffs. But courts should not be in the business of encouraging the creation of lawsuits like this one.

I join in the judgment of reversal.

WEST KEY NUMBER SYSTEM

[From the Baltimore Daily Record]

JUDGE NORTHROP CITES PROBLEMS IN MARYLAND'S FEDERAL COURTS

Distinguished members of the United States Congress, the Bench, and of the Maryland State Bar Association, I am here today in the place of Chief Justice Burger who, unfortunately, was unable to absent himself from a Supreme Court conference. I am also here today in the place of Judge Walter Hoffman, Director of the Federal Judicial Center, who was next extended an invitation to discuss the topic of my remarks today, but who also, unfortunately, was committed to a long-standing conference. Both of these gentlemen have asked me to extend their apologies and their genuine disappointment at not being able to speak to you today. Their remarks would have been more general in scope, directed to my subject for today—the current problems of the federal judiciary.

I am sure that many of you have read the Chief Justice's annual year-end report of the federal judiciary in a recent issue of The Daily Record. I will touch on the matters to which he referred, and also add some additional ones which are directly pertinent to Maryland. I will place specific emphasis on the current problems confronting your court here in Maryland.

ABOVE AVERAGE ACCOMPLISHMENT

Before going further, I do want to thank my colleague, Judge Thomsen, for his kind remarks in presenting me to you today. It seems only yesterday—and yet it was fourteen years ago—that I was privileged to join this able jurist, and the years with him and my other very capable colleagues have been most happy and rewarding ones. We have sailed through turbulent times with little friction among us, and the accomplishments of these judges have been far above average, in volume and caliber.

My topic for today reminds me of a joke which I used on occasion when I first came on the Bench, and I think it clearly points up the problems facing us today. The Bench then consisted of Judges Thomsen and Watkins, along with Senior Judge Chestnut, and it had one of the heaviest caseloads in the country. Despite the great efforts of those three jurists, the docket was falling behind. This condition was, of course, perceived by Judges Thomsen and Watkins on their elevation to the Bench, on the resignation of then Chief Judge Coleman and the assuming of Senior Judge status by Judge Chestnut. Then, just as today, an Ominbus Judges' Bill providing for the creation of additional jurgeships throughout the country was before the Congress of the United States, but the Bill was not acted upon until the election of President Kennedy in 1960.

In that Bill was included two additional judgeships for the District of Maryland, and I was appointed to the Bench; shortly thereafter Judge Winter joined us. But still the workload increased, due to Supreme Court decision which greatly expanded constitutional rights. We are all aware of the fallacy involved in the expansion of constitutional rights via court decision. But, at that same time, the Congress and the Executive in the late 50's and early 60's, were continuing to extend the jurisdiction of the federal judiciary into all areas, many of which had been thought to be the exclusive provinces of the State Courts. The Maryland District Court caseload continued to grow by sheer numbers and new hinterlands.

Once again Congress recognized that the federal judiciary was becoming overburden, and once more an Omnibus Judges' Bill was placed before that body which created one additional judgeship for the District of Maryland. At that same time, Judge Winter was elevated to the Fourth Circuit—and Judges Kaufman and Harvey joined us.

Subsequently, there was an obvious need for additional judges here, and in an Omnibus Bill provision was made for one for Maryland. However, then Senator Tydings, perceiving the importance of the Third Branch, was able to increase to two. Judge Miller joined the Bench in the later part of 1970 and, following Judges Thomsen and Watkins assuming Senior status, Judges Young, Murray and Blair joined in 1971, bringing the Bench to its current complement of seven active judgeships and two senior judgeships.

Judge Watkins carries a full caseload, along with the seven active judges, Judge Thomsen, because of the increasing pressure of his membership on the Railroad Reorganization Board and very important position as Chairman of the Rules Committee of the Judicial Conference of the United States, is just not able to give us full-time assistance, but helps out as much as is humanly possible.

Were it not for the efforts of these two able jurists, I do not know how we could manage.

I have digressed to give you some of the background, but returning to the topic for today, back in 1961, there was a striking similarity in the problems facing your federal District Court: an overwhelming caseload, lack of space to accommodate the court facilities, lack of supporting personnel, and an apparent breakdown in communications between the Judiciary and Legislature, enabling us to bring to the attention of the United States Congress the great difficulties of the Judiciary in meeting its responsibilities, due not only to its own decisions, but the expansion of its jurisdiction.

I think this points up the fact that there has been little change in our situation. Because I apparently arrived on the scene before expected and there was the usual lack of space, I was relegated to a portion of the then library, located on the fifty floor and very close to Judge Thomsen's chambers. One day that eminent jurist came into my "chambers" when I happened to be looking out of the window. He asked what I was doing, and I informed him that I was thinking. His response was "You know you don't have time for that. Get to work."

Though you might consider my analogy somewhat facetious, it is still true today that we are forced to expedite all proceedings, certainly not unthinkingly, but with inadequate time to all aspects of each of the cases. I am sure you will agree that this is not the way to handle the important matters that are brought before the federal judiciary.

In his year-end report, the Chief Justice indicates that in the fiscal year 1975, the caseload per judge was 402 cases, as compared with 317 cases per judge in 1970. He further points out that, based on preliminary data and projected filings, the per judge caseload for the fiscal year ending June 30, 1976, will be 450 cases, an increase of 42 percent since 1970.

However, he calls particular attention to the fact that, by virtue of a wide range of changes in procedures and methods, and the input of longer judicial hours, there has been vast improvement in the disposition rate of cases, rising from the average disposition per judgeship in 1970 of 292 cases, to 371 dispositions in 1975, as increase of 27 percent. Nevertheless, and because there is a limit to all human endurance, even that of judges, the new filings continue to outdistance all human and technological efforts, so that 355 cases per judgeship awaited disposition in 1975, as compared to 285 in 1970.

The report continues with the pessimistic projection of 19,400 appellate filings for the current fiscal year, or 600 per judgeship, a phenomenal 113 percent increase since 1968, when the present number of courts of appeal judgeships was established. In that year, 6615 cases awaited disposition in the eleven courts of appeal; as of July 1, 1975, there were 12,128 cases.

It should be abundantly clear that additional judgeships are needed. Yet the Congress has failed to move on the Omnibus Bill, placed before that body in 1972. The Bill, supported by the Administrative Office of the United States Courts and the Judicial Conference, furnished full statistical background for 52 additional District judgeships and 13 additional appellate judgeships. Four years ago Congress required submission of a four-year projection of judicial manpower needs. In 1976, there is a similar mandate for the period of 1976–80, notwithstanding the fact that there has been no Congressional action to meet the needs already delineated. The new Bill has not been presented, but will probably embody a request for approximately 80 additional judgeships.

Currently, a Bill before Congress requesting 45 additional District judgeships has been approved by the Senate Judiciary Committee, but it awaits full Senate action. The District of Maryand has not been included in the Bill. There is also currently before the House Judiciary Committee, chaired by Congressman Rodino, a Bill to provide seven additional appellate judgeships, which the Senate has already cleared.

Now, of course, the statistics to which I have referred pertain to the entire country. These are raw caseload figures, without any built-in compensation factor for time and effort expended in certain types of litigation or the relative case with which some litigation is disposed of, and in no way reflect the number of parties to each case, the relative nature and complexity, or whether the litigation and trial are of a protracted nature. Nor do the figures gauge the degree of judge-involvement, as in non-jury cases, where the judge is obliged to make findings of fact and conclusions of law as conditions precedent to disposition. However, the sheer volume is sufficient to create a burden insofar as the District Court is concerned.

To give the statistics more impact as far as all of you are concerned, at the end of calendar year 1975, there was an increase in civil filings of 27 percent over 1974 (1882–1483), an increase of 14 percent in criminal filings (879–772) and a 61 percent increase in bankruptcy filings (1263–783). While the volume of increase alone is ample proof of an overload, even more disturbing, as far as the District of Maryland is concerned, is the added effect of the increasingly complex nature of the litigation brought here.

Even though we range about-mid-point in raw figure caseload growth in District Courts throughout the country, we have been inundated with the type of litigation for which there is no adequate measure on the bare statistical scale, and which has been imposing a tremendous strain on the judges of your court.

The unique nature of our caseload became apparent to the Bench back in 1970 when, even with the additional judgeships, we were still experiencing difficulties in keeping pace with the new filings. On the civil side was the involved multi-party, complex antitrust, and patent type litigation, as well as matters raising grave constitutional issues and new and serious legal problems. On the criminal side were the multi-count, multidefendant indictments being brought by several Grand Juries.

In the turbulent 60's, new procedures were adopted by the federal judiciary in order to try to keep pace with the ever-increasing caseload. For examples, there were the adoption of the individual calendar, the introduction of the Magistrate system, and the establishment of the Federal Judicial Center.

The first duty of the Center was to make a definitive study of the overall situation of the Courts in order to determine what innovations might assist in the meting out of justice. The study resulted in recommendations for additional supporting personnel, new techniques such as video-tape proceedings, computerized handling of jury venires, and several others. In addition, the judges were obliged to go back to school for discussion and education in adopting the improved methods for disposition of the expanded litigation being pressed upon the Courts.

As part of its original endeavor, the Center also made a survey to attempt the application of a so-called weighted caseload concept or standard, to measure the personnel needs of the various Courts. The basis of this theory was a detailed time study maintained by all of the judges over a certain period of time. The individual studies were processed through a computer at the Department of Agriculture. The resultant standard, insofar as I am concerned, was completely unsatisfactory since it was bottomed on fallacious theory, and I have some hope that the weighted caseload concept is being reevaluated. However, there is strong opposition to abandonment of this criterion by those District Courts which benefit from its utilization.

Time has proven that the theory is the wrong concept on which to accurately access the caseload burden of the Metropolitan District Courts of which Maryland is one. In these courts are filed 75 percent of the criminal caseload and 56 percent of the civil caseload in the entire Federal Court system. It is, therefore, most important that these courts receive some relief and assistance.

I, early on, felt that the District of Maryland was in a position apart from many others, as far as the caseload was concerned. I requested that the Federal Judicial Center make an indepth study of our Court, the first such study in the country. Since that time, I might add, similar studies have been made in the Eastern District of Louisiana, in New Orleans, the Southern District of Florida, in Miami, the Eastern District of Pennsylvania, in Philadelphia, and in the Central District of California, in Los Angeles. I understand there is also a current request for study of the District Court for the Southern District of New York.

Upon completion of this study—as I have mentioned, the first such to be made in the country—certain procedures were instituted by us which it was hoped would aid in expediting the processing and disposition of our caseload. However, I am sorry to report that we have yet to receive the necessary additional supporting personnel which was suggested by the Center study, and which would permit us to fully implement all of the suggestions made.

However, as a direct result of comparison of the study reports of the five District Courts, it was interestingly revealed that the District of Maryland, unlike the other four, had no large identifiable category of cases which can be easily disposed of—marine personal injury and other personal injury litigation, copyright and trademark cases, cargo damage cases. Moreover, it was determined that we have more multi-count, multi-defendant criminal matters than any of the other courts studied. Indeed, we rank fifth in the country in the number of bank rob-

beries. Also of note is that Maryland has approximately one-third of the antitrust and patent cases filed in the Fourth Circuit.

In addition, Maryland is one of five Districts in the country with criminal caseloads which are one-half of the civil caseloads. Of the other Districts, three are located close to the Mexican border, and the majority of their cases involve illegal immigration and, most recently, illegal importation of drugs or controlled substances. The remaining District, the Eastern District of Michigan, at Detroit, has a more similar caseload to ours, in nature of offenses and complexity of litigation.

A perusal of the nature of the offenses included on our criminal calendar indicates more so-called sophisticated or "white collar" offenses (such as mail fraud, income tax evasion) involving professional persons and public officials, than any other District in our Circuit, and probably in the United States. This type of litigation. almost of necessity, involves protracted trial. Few of our criminal matters fall within the routine category, almost all involving multi-defendant, multi-count indictments.

Adding to our dilemna was the passage of the so-called Speedy Trial Act of 1974. The implementation of this piece of legislation over the five year period beginning July 1, 1975, will climax in your court being virtually foreclosed from trying and but criminal matters. Of course, I am certain that it was very difficult for any Congressman to vote against a speedy trial. In some circles this has been likened to being against the flag and motherhood. However, upon inquiry of some of our elected representatives, it was readily learned that they thought they were voting against the so-called street crimes, burglary, theft, etc. which are triable in the State Courts. They did not realize they were imposing an additional burden on the federal courts of eventually either trying all indicted criminals within sixty days or turning them loose.

Despite repeated warnings from the Chief Justice, Congress has continued, and indeed seems to have speeded up, the enactment of legislation which confers jurisdiction on the federal judiciary involving issues which have no place on our docket, by virtue of either nature or interest, and properly belong before the State Courts, if anywhere.

The continuing flow of legislation, without supplementing the tools of our trade—additional judges and supporting personnel—can only result in a total inundation and frustration of our Fedreal Judical system. It most assuredly has had a noticeable effect on your district court. But the legislation to provide additional judicial and other manpower pends before a Congress in an election year. The time for action, of course, is now, but it would not appear we can expect any immediate assistance, even though everyone, including the news media, clearly understands our situation and urges action.

In common with the other federal District Courts, we must carry the burden of enforcing the ever-expanding constitutional rights of the individual and the class. To a greater extent than the other courts, however, we of the District of Maryland are faced with the confrontations between federal agencies established by the United States Congress and the State. Our jurisdiction, either by judicial fiat of Congressional act, is practially limitless. Our ever-expanding judisdiction extends to such momentous constitutional issues as the suitable length of one's hair and the extent of discipline to be meted out in our school system—to the right of a State to perform an age-old function.

I could bombard you with other statistics and generalizations, but I feel sure that all of you, as practitioners of the law, see clearly the delineations and the hue of the picture I have been painting for you. There is every indication that if we do not secure additional judgeships for the District and Maryland, it will be almost impossible to try your civil litigation, no matter what the degree of its complexity, if we continue on the current course. For the one and one-half years, the juries of your court have been gradually falling behind in the disposition of their civil caseloads because of the rate of increase in new filings. We who are most intimately familiar with the situation can see no improvement in sight, you have noted, we are obliged, and will be increasingly obliged, to turn our full attention to criminal matters.

There will be small hope for resolution of meritorious and serious private litigation in a federal forum unless additional judgeships are created and adequate supporting personnel applied. Even more important there must be a slowing down of jurisdiction—expanding legislation on the part of your Congress.

ADDITIONAL MATERIAL RELATING TO TITLE V

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

JAN 12 1976

Department of Justice
Washington, D.C. 20530

January 6, 1976

Senator Philip A. Hart
Chairman
Subcommittee on Antitrust and Monopoly
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Hart:

Pursuant to a request by your staff, enclosed is a statistical table setting forth the disposition of the Division's motions for preliminary injunctions in Section 7 cases since the 1950 amendment to Section 7 of the Clayton Act.

This information should refute any suggestion that the Division indiscriminately seeks preliminary injunctions. During this twenty-five year period, the Division sought only 43 full or partial preliminary injunctions that have been opposed by defendants. Excluding four pending cases, the Division was ultimately successful in 31 of those 39 cases.

During the hearings on S. 1284, the point was made that the Division was successful at the ensuing trial in only one case in which a preliminary injunction had been denied (United States v. Phillips Petroleum). The table suggests that this is a misleading statistic since the Division was ultimately successful in 16 of the 23 cases in which a preliminary injunction was denied and the case then proceeded to final judgment.

I shall be happy to provide you with whatever additional information you may regard as of assistance in securing the passage of S. 1284.

Sincerely,

Thomas E. Kauper

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

MOTIONS FOR PRELIMINARY INJUNCTIONS IN SECTION 7 CASES
1955-1975

	Ruling on the Merits			
	Jgmt. for Gov.	Jgmt. for Def.	Pending	TOTAL
I. Motions For Full Preliminary Injunctions:				
CONTESTED MOTIONS				
GRANTED	11*	0	1	12
DENIED	16	7	3	26
UNCONTESTED MOTIONS				
GRANTED	7	2	2	11
MOTION NOT DISPOSED OF				3**
				52
II. Motions for Partial Preliminary Injunctions:				
CONTESTED MOTIONS				
GRANTED	3	1	0	4
DENIED	1	0	0	1
UNCONTESTED	3	0	1	4
MOTION NOT DISPOSED OF				1
				10

* Includes two cases in which merger was abandoned prior to trial.
** Includes one case in which merger was abandoned prior to a ruling on the motion.

DISPOSITION OF MOTIONS FOR PRELIMINARY INJUNCTIONS
IN SECTION 7 CASES
IN WHICH A TEMPORARY RESTRAINING ORDER HAS BEEN GRANTED

Title of Case	Date TRO Granted	Preliminary Injunction Motion Filed	Preliminary Injunction Disposed Of	Number of Days
United States v. Brown Shoe Company	11/28/55	11/28/55	01/13/56	46
United States v. Diebold	08/24/59	08/24/59	10/04/59	42
United States v. Pabst Brewing	05/13/60	05/09/60	06/15/60	33
United States v. Alcoa (Rome)	06/01/60	04/01/60	06/01/60	0
United States v. Kaiser (Kawneer)	04/27/61	04/27/61	06/30/61	64
United States v. MCA	07/13/62	07/16/62	10/18/62	69
United States v. Parents Magazine	07/27/62	07/27/62	08/10/62	14
United States v. Ingersoll-Rand	02/14/63	02/14/63	03/06/63	20
United States v. Chrylser	07/30/64	07/31/64	08/17/64	18
United States v. Aluminium Ltd.	12/30/64	12/30/64	01/05/65	6
United States v. Pennzoil	08/04/65	08/04/65	12/30/65	149
United States v. Herff Jones	10/05/65	10/04/65	12/09/65	65
United States v. First National City Bank	12/30/65	12/30/65	01/04/66	5
United States v. Tidewater Marine	01/16/68	01/16/68	02/09/68	24
United States v. Wilson Sporting	03/28/68	03/27/68	07/08/68	103
United States v. Atlantic Richfield	01/17/69	01/15/69	02/17/69	31

Title of Case	Date TRO Granted	Preliminary Motion Filed	Injunction Disposed Of	Number of Days
United States v. Wachovia	04/25/70	05/05/70	06/04/70	40
United States v. Navajo Freight	08/04/70	08/03/70	11/22/71	111
United States v. White Consolidated	01/27/71	01/27/71	02/24/71	28
United States v. Parker-Hannifin	04/29/71	04/27/71	08/10/71	103
United States v. Amsted	12/30/71	12/29/71	02/03/72	35
United States v. American Ship	08/16/72	08/17/72	01/08/73	145
United States v. Halliburton	04/24/73	04/24/73	06/14/73	51
United States v. Amax	08/25/75	09/04/75	10/24/75	50

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ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

January 8, 1976

Honorable Philip A. Hart
United States Senate
Washington, D.C. 20510

Dear Senator Hart:

In response to your request the following information has been compiled for the fiscal years 1970 through 1975:

Merger cases filed:

1970	1971	1972	1973	1974	1975
15	23	19	16	13	3

Of the 89 merger cases filed during this period 29 were terminated by consent judgments, 21 dismissed as the merger was abandoned and 2 were litigated and won. In addition to the 52 cases won, the Government lost 11 litigated cases. Twenty six of these merger cases were pending at the end of fiscal 1975.

Sincerely yours,

Thomas E. Kauper

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

JAN 12 1976

OFFICE OF THE GENERAL COUNSEL

January 7, 1976

The Honorable Philip A. Hart
Chairman, Subcommittee on Antitrust
and Monopoly
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Prior to leaving the Commission on December 31, 1975, Chairman Engman asked me to see that you receive a timely reply to your letter of December 16, 1975, inquiring about the Commission's merger activity during the last 5 years. In response to your questions, the staff of the Bureau of Competition has assembled the following data:

	1970	1971	1972	1973	1974	1975
Mergers cases brought by FTC	2	8	5	2	9	3
No. settled by FTC	3	3	2	6	4	1
No. litigated and won by FTC	2	3	0	3	0	3
No. settled after litigation initiated	1	1	2	1	3	4
Losses	0	0	2	1	1	2

There are 14 merger cases still pending as of this writing.

The Commission welcomes your continuing interest in our law enforcement activities.

Sincerely,

Robert J. Lewis

Robert J. Lewis
General Counsel

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

November 18, 1975

Mr. Ralph Oman
Legislative Assistant
Room 260-F
Russell Senate Office Building
Washington, D.C. 20510

Dear Ralph:

Enclosed is a possible reformulation of the stay provisions of Title V of S. 1284, which we discussed yesterday afternoon.

While this language is quite tentative and has not been reviewed by Tom Kauper, it is something which seems responsive to the concerns expressed during our meeting last week and it at least is worthy of discussion.

In particular, you will find that the only "automatic" feature of this provision is that consummation is prohibited until the district court is able to hold a hearing on the matter. This would ordinarily be only a very short period of time, since the language further directs the court to proceed as expeditiously as possible. Whether a stay will then be entered to prevent consummation until litigation is completed will depend upon whether the court can make the findings specified by the language based on the record established during the hearing.

As I indicated to you yesterday, we regard as crucial to an effective enforcement program the ability to avoid consummation of transactions which are ultimately adjudged to violate Section 7. Absent such an ability, the divestiture problems become in large part unmanageable. The most horrible example is perhaps the El Paso Gas case, in which divestiture took 16 years to accomplish following the denial of a preliminary injunction and ultimate success on the merits.

I would be interested in your reaction to this language. Let's keep in touch.

Sincerely,

JOE SIMS
Deputy Assistant Attorney General
Antitrust Division

HILL, CHRISTOPHER AND PHILLIPS, P. C.
2000 L STREET, N. W.
WASHINGTON, D. C. 20036

DUMOND PECK HILL*
GEORGE L. CHRISTOPHER
RICHARD M. PHILLIPS
GILBERT C. MILLER
ALAN ROY DYNNER
JOSEPH J. BRIGATI
JUAN A. DEL REAL
ALAN J. BERKELEY
JAMES C. VAUGHTER
CHARLES LEE EISEN
ELINOR W. GAMMON
ROBERT A. WITTIE
CHERIF SECKY
THEODORE L. PRESS
RONALD W. STEVENS
STEPHEN W. GRAFMAN
CHARLES S. LEVY
EDWARD B. CROSLAND, JR.
LAWRENCE COE LANPHER

FRANCIS THORNTON GREENE
HERBERT M. BROWN
COUNSEL

TELEPHONE (202) 452-7000
CABLE: HIPHI
TELEX 440209 HIPH UI
WU 89-421
WRITER'S DIRECT DIAL NUMBER
(202) 452-7040

DEC 2 1975

November 25, 1975

The Honorable Philip A. Hart
Chairman
Subcommittee on Antitrust and
Monopoly
Senate Committee on the Judiciary
United States Senate
Washington, D. C. 20515

Re: S.1284

Dear Senator Hart:

We are writing on behalf of our client, the Association of Closed-End Investment Companies ("Association"), with respect to the provisions of Title V of S.1284.

The Association is a group of 23 investment companies with assets of over $3 billion. All of the companies are registered with the Securities and Exchange Commission under the Investment Company Act of 1940. A list of the Association membership is attached hereto.

Closed-end investment companies, like open-end investment companies (commonly called "mutual funds"), provide investors with an opportunity to invest in the securities markets through professional management of diversified portfolios. Closed-end companies, however, unlike mutual funds, neither continuously offer nor redeem their shares. Instead, their securities are bought and sold in the various trading markets.

Closed-end investment companies, like other institutional investors, also buy and sell securities in the nation's trading markets on a regular basis. Indeed, such portfolio trading operations lie at the heart of the investment company business, and any interference with these activities could seriously affect the public shareholders of these companies. For this reason, the

Association has had discussions with Bernard Nash, Esquire, Assistant Counsel to your Subcommittee on Antitrust and Monopoly, concerning the need for certain amendments to Title V of S.1284.

The Association believes amendments are necessary to avoid a drastic and entirely unintended effect of the bill on the routine portfolio trading operations of closed-end investment companies and other institutional investors. Since such investors generally do not invest for the purposes of control, their portfolio transactions do not raise the underlying antitrust problems to which Title V is directed. Nevertheless, Title V of S.1284, as reported by the Subcommittee to the full Committee, does not contain a statutory exemption for those transactions and requires a number of other clarifying changes.

We enclose herewith a draft of proposed amendments which would effect the necessary changes to Title V for these limited purposes. The proposed amendments are similar to those discussed with Mr. Nash, except that we have added to the proposed definition of "voting securities" the phrase:

> "or, with respect to unincorporated issuers, persons exercising similar functions"

We also enclose, for your consideration, a discussion of a problem relating to the determination of ten percent ownership which we believe should be mentioned in the Committee Report as requiring resolution by administrative rule-making.

We believe that if Title V of S.1284 were amended as proposed, and the suggested administrative action were taken by the Federal Trade Commission, the bill would not adversely affect the portfolio operations of closed-end investment companies and other institutional investors similarly situated. In that event, the Association of Closed-End Investment Companies would have no objection to Title V of the bill.

The Association appreciates the thoughtful consideration given by Mr. Nash to the problems raised by Title V

HILL, CHRISTOPHER AND PHILLIPS, P. C.

To: The Honorable Philip A. Hart
November 25, 1975
Page 3

of S.1284. If you or your staff have any questions concerning this matter please do not hesitate to call upon us.

Sincerely yours,

Richard M. Phillips

Richard M. Phillips

Enclosures

material as the Federal Trade Commission shall by general regulation prescribe, after consultation with the Assistant Attorney General, and after notice and submission of views, pursuant to section 553 of title 5, United States Code.

"(4)(A) The Federal Trade Commission, after consultation with the Assistant Attorney General, is authorized and directed to define the terms used in this section, prescribe the content and form of reports, by general regulation except classes of persons and transactions from the notification requirements thereunder, and to promulgate rules of general or special applicability as may be necessary or proper to the administration of this section, insofar as such action is not inconsistent with the purposes of this section, after notice and submission of views, pursuant to section 553 of title 5, United States Code.

"(B) The following ~~*regulations excepting*~~ *classes of* ~~*persons and*~~ *transactions* are exempt from the notification requirements of this section: ~~*shall include, but need not be limited to, the following exceptions—*~~

"(A) goods or realty transferred in the ordinary course of business;

"(B) bonds, mortgages, deeds of trust, or other obligations which are not voting securities; ~~*without voting rights;*~~

"(C) interests in a corporation at least 50 per centum of the stock of which is already owned by the acquiring person or a wholly-owned subsidiary thereof;

"(D) transfers to or from a Federal agency or a State or political subdivision thereof;

"(E) transactions exempted from collateral attack under section 7 of this Act if approved by a Federal administrative or regulatory agency: Provided, That duplicate originals of the information and documentary material filed with such agency shall be contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

"(F) transactions which require agency approval under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), as amended, or section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842), as amended;

"(G) acquisitions, solely for the purpose of investment, of voting securities, if at the time of such acquisition, the securities ~~stock when the stock~~ acquired or held ~~does~~ do not exceed 10 per centum of the outstanding voting securities of the issuer; ~~voting rights;~~

"(H) acquisitions of voting securities if, at the time of such acquisition, the securities ~~stock when the stock~~ acquired ~~does~~ do not increase, directly or indirectly, the acquiring person's ~~or persons'~~ share of outstanding voting securities of the issuer; ~~voting rights; and~~

"(I) acquisitions, solely for the purpose of investment, of voting securities pursuant to a plan of reorganization or dissolution of assets, other than voting securities ~~stock~~ or other voting share capital, by any bank, banking association, trust investment company company, or insurance company, in the ordinary course of its business.

"(C) For the purpose of subsection (b)(4)(B) of this section, 'voting security' means any security presently entitling the owner or holder thereof to vote for the election of directors of a company or, with respect to unincorporated issuers, persons exercising similar functions.

AMERICAN
LIFE INSURANCE
ASSOCIATION

1730 PENNSYLVANIA AVENUE, N.W. WASHINGTON, D.C 20006
(202) 872-8750

WILLIAM B HARMAN, JR.
EXECUTIVE VICE PRESIDENT

December 3, 1975

DEC 5 1975

The Honorable Philip A. Hart
Chairman, Subcommittee on Antitrust
and Monopoly
Committee on the Judiciary
United States Senate
Washington DC 20510

Dear Mr. Chairman:

In accordance with your request, we have reviewed the exemptive amendments to Title V of S.1284 included in the bill as reported on July 28 by the Antitrust and Monopoly Subcommittee. We also have reviewed the additional exemptive provisions proposed by the Investment Company Institute on behalf of the mutual fund industry and by an association of closed-end funds.

Our Association represents 379 companies, with assets of $254 billion, including at year-end 1974 $96.6 billion in corporate debt securities and $21.9 billion in corporate equity securities. On behalf of our membership, we very much appreciate the consideration and cooperation afforded by the Subcommittee and its staff in evaluating our concerns about the impact of Title V on capital formation by industry in general and, specifically, on our investment function. We are satisfied that inclusion in Title V of the exemptions reported by the Subcommittee coupled with those proposed by the mutual fund industry will assure that Title V does not adversely affect the capital markets or the ability of the life insurance industry to continue its investment function in the capital markets.

Again, our appreciation for the Subcommittee's effort in understanding our concerns.

Sincerely yours,

William B. Harman, Jr.

William B. Harman, Jr.

WBH:ecn

Investment Company Institute
1775 K STREET N. W. WASHINGTON, D. C. 20006
(202) 293-7700

November 21, 1975

Honorable Philip A. Hart, Chairman
Subcommittee on Antitrust & Monopoly
Senate Committee on the Judiciary
127 C Street, N. E.
Washington, D. C. 20515

Re: Title V of S. 1284

Dear Senator Hart:

On Friday, October 31, 1975, I met with Bernard Nash, Esq., Assistant Counsel to the Subcommittee to discuss various amendments to Title V of S. 1284. Attached hereto are copies of: (1) our proposed amendments; (2) a summary of these proposed amendments; and (3) our suggested language for the Committee report.

We believe that if Title V is amended as suggested and if the Committee report sets forth the suggested language, Title V would not adversely affect the investment programs of mutual funds in the capital markets.

We greatly appreciate the consideration you and your staff have given this matter. Please do not hesitate to contact us if we may be of further assistance.

Very truly yours,

Matthew P. Fink
Associate Counsel

Attachments

ASSOCIATION of REGISTERED BANK HOLDING COMPANIES

DONALD L. ROGERS
EXECUTIVE DIRECTOR

730 FIFTEENTH STREET, N.W., WASHINGTON, D.C. 20005
(202) 393-1158

November 10, 1975

Honorable Philip A. Hart, Chairman
Subcommittee on Antitrust and Monopoly
Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I have been advised by your Assistant Counsel, Bernard Nash, that consideration is being given to an exemption to the premerger notification requirements of Title V of your bill, S. 1284, as follows:

> "(G) transactions which require agency approval under section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843), as amended: Provided, that duplicate originals of the information and documentary material filed with such agency shall be contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least thirty days prior to consummation of the proposed transaction."

As we understand this proposal, a bank holding company would be exempted from Title V of your bill in regard to section 4 transactions, if the company filed a copy of its application for a section 4 acquisition with the Federal Trade Commission and the Assistant Attorney General at the same time the application is filed with the Federal Reserve Board. Experience has shown that more than thirty days elapse between the time an application is filed with the Board and a transaction under section 4 is consummated.

The proposed exemption meets the objections we raised in our statement of August 27, 1975, and we hope the exemption will be adopted by the Senate Committee on The Judiciary.

Sincerely yours,

Donald L. Rogers

Donald L. Rogers

USL
UNITED STATES LEAGUE of SAVINGS ASSOCIATIONS WASHINGTON OFFICE
1709 NEW YORK AVENUE, N.W. / WASHINGTON, D.C. 20006 / TEL. (202) 785-9150

RAYMOND J. GUSTINI
Staff Counsel

January 16, 1976

HAND DELIVERED

Senator Phillip Hart
Chairman, Senate Antitrust
and Monopoly Subcommittee
127 C Street, N.E.
Washington, D. C. 20510

RE: Title V, S. 1284

Dear Senator Hart:

We have examined Title V of S. 1284, the Antitrust Improvements Act, in connection with mergers of savings and loan associations and savings and loan holding companies. Under the present version of S. 1284 such institutions would be required to provide pre-merger notification to FTC and the Justice Department 30 days before the effective date of the merger. However, Section 408(e) of the National Housing Act which governs acquisitions of savings and loan associations by savings and loan holding companies requires the FSLIC to notify the Justice Department 30 days before it issues an approval of such acquisitions. In view of this existing statutory notification requirement contained in Section 408(e) the information required by Title V would merely duplicate information which the FSLIC is presently required by law to submit to the Justice Department. In addition, although there is no waiting period where mergers of Federally-insured savings and loan associations are involved, strict compliance with the Federal antitrust laws is necessary. Moreover, the Federal Home Loan Bank Board's regulations require extensive information from merger applicants which could be utilized to comply with the pre-merger notification provisions of Title V without affecting the data which is necessary for both the Justice Department and Federal Trade Commission to receive in order to undertake a careful and informed antitrust analysis.

In light of the above, we would suggest an amendment to Title V of S. 1284. First, we would suggest that in view of the existing statutory requirement for pre-merger notification to the Department of Justice in Section 408(e) of the National Housing Act that acquisitions covered by that Section be exempted from the provisions of Title V. In addition, we would propose that the data already submitted to the Federal Home Loan Bank Board pursuant to the Board's regulations be utilized by the Department of Justice and Federal Trade Commission under S. 1284. We propose that the provisions of Title V be modified to permit original duplicate copies of such data to be forwarded by merger applicants directly to the Department of Justice 30 days prior to the effective date of the merger. No merger could be declared effective until the 30-day period expires. We feel that this would eliminate the creation of still another set of Federal forms and would make maximum use of the extensive information gathered by the Bank Board in its analysis of savings and loan mergers.

We will be pleased to discuss our suggestions further with you or any members of the Committee or the staff. Thank you for your assistance.

Very truly yours,

Raymond J. Gustini

Raymond J. Gustini
Staff Counsel

FEDERAL HOME LOAN BANK BOARD
WASHINGTON, D. C. 20552
320 FIRST STREET N.W.

OFFICE OF
GENERAL COUNSEL

FEDERAL HOME LOAN BANK
SYSTEM
FEDERAL HOME LOAN
MORTGAGE CORPORATION
FEDERAL SAVINGS & LOAN
INSURANCE CORPORATION

January 26, 1976

The Honorable Philip A. Hart
Chairman
Subcommittee on Antitrust and Monopoly
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

It is our understanding that you are considering offering an amendment to Title V of S. 1284, the "Antitrust Improvements Act of 1975" which would exempt acquisitions involving thrift institutions chartered by the Federal Home Loan Bank Board or insured by the Federal Savings and Loan Insurance Corporation from the premerger notification procedures of that title. We understand that the proposed exemption would read as follows:

> "(G) transactions which require agency approval under section 403 of the National Housing Act (12 U.S.C. 1726), as amended, <u>and</u> section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464), as amended; Provided, That duplicate originals of the information and documentary material filed with such agency shall be contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed transaction;". [Emphasis added.]

As you know, the Board would prefer an exemption from Title V for transactions involving insured institutions which the Board (or the Corporation) must approve prior to consummation. While the Board believes that the proposed amendment represents an improvement over prior drafts, we urge that two changes be made to this language. First, we suggest that the underscored "and" in the above

quotation be changed to "or", so as to make clear that transactions involving state-chartered FSLIC-insured institutions are covered under the exemption. As the language presently reads, it would cover only transactions involving Federally chartered savings and loan associations, all of which are FSLIC-insured.

Second, the proposed language does not exempt from the notification requirement supervisory mergers in which the Board must act immediately to place an institution in a sound and solvent condition. It is our understanding that the report language will indicate the Committee's intention that supervisory mergers are to be excepted transactions under the Federal Trade Commission's regulations implementing Title V of the Act.

I cannot too strongly emphasize the importance of providing, in express statutory language, an exemption from the 30 day prior notification requirement for cases involving supervisory mergers. These mergers are at the very center of the Board's supervisory responsibilities involving negotiations of extreme delicacy and sensitivity which can require action within a matter of days, and imposing the most severe demands upon the accumulated experience of this agency as a supervisor of financial institutions. They are a last final action taken by the Board to avoid default and the consequent draw upon the reserves of the Federal Savings and Loan Insurance Corporation. These mergers are essential to a system of Federal insurance of accounts and the depositor confidence and stability of the financial institutions which that system brings.

Accordingly, we urge the Committee to modify the proposed draft, so as to expressly exempt these supevisory cases from the 30 day prior notification requirement. An amendment such as we desire was sent to Mr. Nash of your staff in a letter dated January 16, 1976.

In closing, however, I would like to emphasize that the Board considers the proposed amendment to be a substantial perfection over prior drafts and one which, with the two additional amendments offered in this letter, the Board could support.

Sincerely,

Charles E. Allen

Charles E. Allen
General Counsel

NAMES & FACES: The inside story of Lazard Freres' merger and acquisition star

The remarkable

Felix G. Rohatyn, at 44, is the archetype of the new generation of investment bankers that is taking over Wall Street. As the man most responsible for the renown of Lazard Frères & Co., the venerable investment banking firm, as a shrewd deal-maker in mergers and acquisitions, Rohatyn has had one of the most enviable careers in the financial community.

He is a notable practitioner of the idea that investment banking must be a dynamic force that keeps pace with the trends of its business clients. He has shown an uncanny skill in developing new business for his firm by capitalizing on his clients' ambitious plans for expansion.

Youthful-looking, candid, and well-connected as a director of five major corporations and through the myriad contacts of the 25 Lazard partners in the U. S., Rohatyn has built Lazard's merger and acquisition services into what senior partner André Meyer terms "the most spectacular and sometimes most profitable part of our business." Meyer's protege has been particularly busy in the past few months, as the economy picks up speed and the pace of acquisition activities quickens.

Rohatyn: Model of the new breed

Richard Knapp—BW

Meyer, who is also a partner in Lazard's French branch and a director of its British firm, says that Rohatyn "can negotiate anything." That is a mighty compliment coming from one of the most highly regarded, high-powered persuaders on the international financial scene.

It is Rohatyn's ability as a negotiator that sets him apart from the run-of-the-mill partners at other investment banks, many of whom are also engaged in developing mergers and acquisitions for their clients. Such firms as Lehman Bros., Goldman Sachs, Loeb, Rhoades, and Morgan Stanley are all very active in the field, but few if any have succeeded so dramatically as Rohatyn.

In fact, Rohatyn's very success has become a problem for Meyer, who has

The 10-year acquisition trail at Lazard Frères

Client	Deal	Payment
1964		
Schenley Industries	Acquisition of 52% of Buckingham	$402,623
I.F.I.	Sale of interest in Ferrania to 3M	313,740
1965		
Lone Star Cement	Acquisition of facilities of New York Trap Rock	616,000
Lone Star Cement	Acquisition of Pacific Cement & Aggregates	150,000
1966		
RCA	Acquisition of Random House	250,000
Englehard Hanovia	Acquisition of Connors & Hoffmann Footwear	195,000
ITT Consumer Services	Acquisition of Airport Parking Corp. of America	150,000
1967		
ITT	Acquisition of Claude Paz & Visseeux	125,000
Douglas Aircraft	Acquisition by McDonnell	1,000,000
Transamerica	Tender offer for shares of United Artists	482,088
RCA	Acquisition of Hertz	750,000
1967-68		
Engelhard Industries	Acquisition of Mineral & Chemicel Philipp	750,000
American Potash & Chemicals	Acquisition by Kerr-McGee	125,000
1968		
Levitt & Sons	Acquisition by ITT	250,000
National Periodical Publications	Acquisition by Kinney National	300,000
ITT	Acquisition of Rayonier	600,000
ITT	Acquisition of Pennsylvania Glass Sand	250,000
ITT	Acquisition of Continental Baking	400,000
Owens-Illinois	Acquisition of Lily Tulip	500,000

Data: House antitrust subcommittee, Lazard Freres

Felix G. Rohatyn

wanted the younger man to take over the reins of senior partner. "I am sorry that Felix is so highly motivated in what he is doing," Meyer sighs. "I have said that I consider him my son, and I would not say that if I did not mean it. I had hoped that he would take over this firm, but he has turned me down. He wants to continue what he is doing with us. He feels it is important, and it is, but it means that I must work too hard and find someone else who is capable of doing the job."

In a business that relies primarily on personal contacts, Rohatyn (pronounced RO-uh-tin) operates mostly behind the scenes. While troubled conglomerate Boise Cascade Corp. was selling off parts of its business recently, Rohatyn and his small group of acquisition and merger specialists worked generally unnoticed in the complicated negotiations. Rohatyn's name has appeared in print a good deal over the past several years, but that had less to do with Lazard than with delicate negotiating missions that he performed for others.

Client	Deal	Payment
1969		
United Fruit	Acquisition by AMK	$250,000
AMK	Exchange offer for United Fruit	384,802
Loew's Theatres	Acquisition of Lorillard	1,000,000
Sinclair Oil	Acquisition by Atlantic Richfield	200,000
ITT	Acquisition of Canteen	250,000
McLean Industries	Acquisition by R. J. Reynolds Tobacco	500,000
Kinney National	Acquisition of Warner Bros.	1,500,000
Northwest Industries	Tender offer for B. F. Goodrich	250,000
Ebasco Industries	Acquisition by Boise Cascade	750,000
ITT	Acquisition by Grinnell Co.	300,000
1970		
Tee-Pak	Purchase by Continental Can	N.A.
ITT	Hartford Fire & Casualty Co.	1,000,000 +
1971		
AMF	Purchase of Head Ski	N.A.
Pfizer	Purchase of Howmedica	575,000
ITT	Purchase of O. M. Scott Grass Seed Co.	400,000
ITT	Purchase of Ashe Chemical	N.A.
ITT	Purchase of Eurofund	N.A.
RCA	Purchase of Cushman & Wakefield	175,000
RCA	Purchase of Stamper Foods	500,000
RCA	Purchase of Coronet Industries	500,000
J. B. Williams	Purchase by Nabisco	N.A.
1972		
Brown & Williamson	Purchase of Kohl Supermarkets	N.A.
AMF	Purchase of Hatteras Yacht from North American Rockwell	N.A.
1973		
Boise Cascade	Sale of Mobile Home Div. to Bendix Corp.	N.A.
	Sale of Ebasco Services to Halliburton Co.	N.A.
	Sale of Chemico to Aerojet-General	N.A.

NA, Not available

The erstwhile heir apparent.

Rohatyn first attracted public attention as chairman of the so-called "Crisis Committee" set up by the New York Stock Exchange to fend off the collapse of large brokerage firms during the financial crisis that plagued Wall Street in 1969-1971. After his negotiating skills were called into play, he pulled off the reluctant absorption of floundering Goodbody & Co. by Merrill Lynch, Pierce, Fenner & Smith, the merger of Hayden, Stone with Cogan, Weill, and the takeover of duPont Glore Forgan by Texas computer services magnate H. Ross Perot.

Shortly after that, Rohatyn was reluctantly exposed to the public eye by the Congressional flap over his service as representative for International Telephone & Telegraph Corp., of which he is a director, arguing against the Justice Dept.'s efforts to force ITT to divest itself of Hartford Fire & Casualty Co. But despite these roles in the limelight, Rohatyn has remained a relatively private person.

Avis as a springboard

Rohatyn's star did not really begin to shine at Lazard until eight years ago, when he personally negotiated the sale of Avis Corp., then owned by Lazard, to ITT. Rohatyn's closest associate in Lazard's merger and acquisition operations, Raymond S. Troubh, terms the Avis deal "the linchpin of Felix's career." ITT Chairman Harold S. Geneen was impressed by the younger man, then 37, and later named him a director of his company.

Once Rohatyn was on ITT's board, no one could accuse him of being an inactive member. According to the report of the House Judiciary subcommittee that in 1969 investigated conglomerate mergers, Rohatyn "was in a position to play a major role in shaping the ITT acquisition program. Information on companies available for acquisition came through Lazard Frères' investment banking activities. With an intimate knowledge of ITT's operations Lazard stimulated its own income and facilitated ITT's acquisition program."

André Meyer does not agree with the construction the committee placed on

92d Congress
1st Session

HOUSE COMMITTEE PRINT

INVESTIGATION OF CONGLOMERATE CORPORATIONS

A REPORT BY THE STAFF

OF THE

ANTITRUST SUBCOMMITTEE
(SUBCOMMITTEE NO. 5)

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-SECOND CONGRESS
FIRST SESSION

PURSUANT TO

H. RES. 161

A RESOLUTION AUTHORIZING THE COMMITTEE ON THE JUDICIARY TO CONDUCT STUDIES AND INVESTIGATIONS RELATING TO CERTAIN MATTERS WITHIN ITS JURISDICTION

JUNE 1, 1971

Lazard Freres & Co.

Investment banking firms, management consultants, loan officers in commerical banks and other members of the financial community have played a prominent role in the merger movement. These groups have stimulated mergers and have secured substantial compensation from functions as merger brokers. Participants in this phase of the merger movement vary from rank opportunists who provide little or no services other than "finders" influence to reputable organizations of major stature that bring valuable analytical and research information to bear on an acquisition transaction. Lazard Freres & Co., intimately associated with ITT's merger program, is an example of the latter type of corporate intermediary.

During the period January 1, 1960–February 1, 1969, in connection with particular proposed mergers or acquisitions,[195] ITT utilized the investment banking and consulting services of Kuhn, Loeb & Company; Lazard Freres & Company; Herbert Buschman; and Roth, Gerard & Company. The acquisition in 1965 of Avis, Inc., led to a relationship with Lazard Freres, from whom controlling interest in Avis was purchased by ITT, which involved the investment banking firm deeply in ITT's acquisition program.

Felix G. Rohatyn, as managing partner in the Avis venture capital activity of Lazard Freres worked closely with Harold S. Geneen after the merger. This led to Mr. Rohatyn's later appointment on December 13, 1967 to ITT's board of directors, and service as a member of

[194] Hearings: 3–190.
[195] Id. at p. 1460.

its exceutive committee.[196] Through the Avis acquisition Lazard Freres and several of its partners, became substantial stockholders of ITT and thus have a direct interest in ITT's future.[197]

Lazard Freres & Company, as investment bankers, perform several classes of services: manager in major underwritings; agent in connection with the placement of private securities; adviser for investment accounts; manager of venture capital activities; and adviser on mergers and acquisitions.[198] During the period 1964–1968, the merger and acquisition function became increasingly important in relation to its other business. From January 1, 1964 through September 5, 1969, Lazard Freres received $16,058,243 in merger fees. During this period, the firm's gross income increased roughly 2½ times, 256 percent, while at the same time its income from merger and acquisition services increased nearly 6 times, 584 percent.

In the period January 1, 1964 through September 5, 1969, Lazard Freres provided merger services involving 68 separate acquisitions. The average fee for services rendered amounted to $236,154.[199] In addition to Lazard Freres, there are 10 to 15 other "major" investment banking firms in New York City alone that provide mergers and acquisition services, and numerous other smaller firms performing similar functions.[200] In view of the large income derived from merger transactions, it is evident that the major investment banking firms have been substantial contributors to the magnitude of the merger wave.[201]

The following table sets forth Lazard Freres compensation for merger and acquisition services from January 1, 1964–September 5, 1969:

LAZARD FRERES & CO.—COMPENSATION RECEIVED FOR MERGER AND ACQUISITION SERVICES, JAN. 1, 1964 TO SEPT. 5, 1969[1]

Year and compensation paid by	Transaction	Compensation	Description of services provided
1964			
Carter Products, Inc.	Study for Carter of acquisition of Onyx Chemical Corp. by Millmaster Chemical Corp.	$17,500.00	Study of possible combination.
Carter Products, Inc.	Acquisition of stock interest in Canal Industrial Corp. by Carter Products, Inc.	5,000.00	Financial advice re acquisition.
Schenley Industries, Inc.	Acquisition of 52 percent of the stock of The Buckingham Corp. by Schenley Industries, Inc.	402,623.00	Do.
Delhi Taylor Corp.	Liquidation of Delhi Taylor and sale of certain assets to Utah Minerals Corp.	12,500.00	Do.
Istituto Finanziario Industriale, S.p.A.	Sale of IFI interest in Ferrania, S.p.A. to Minnesota Mining and Manufacturing Co.	313,748.00	Do.
1965–66			
Lone Star Cement Corp.	Acquisition of various aggregates facilities of N.Y. Trap Rock Co. by Lone Star Cement Corp.	618,000.00	Financial advice re acquisition and disposition of assets.
Herbert Cobey	Sale of H. Cobey's interest in the Cobey companies.	70,000.00	Financial advice re proposed sale of business.

See footnotes at end of table, p. 154.

[196] Id. at pp. 105–106, 228, 465.
[197] Id. at pp. 232–233, 243, 772, 877.
[198] Id. at p. 211.
[199] Id. at pp. 211, 215, 735, 743.
[200] Id. at pp. 237–238.

LAZARD FRERES & CO.—COMPENSATION RECEIVED FOR MERGER AND ACQUISITION SERVICES, JAN. 1, 1964–SEPT. 5, 1969 [1]—Continued

Year and compensation paid by	Transaction	Compensation	Description of services provided
1965			
Owens-Illinois, Inc	Sale of Owens-Illinois, Inc. paper properties to Alton Box Board Co.	$45,000.00	Financial advice.
Bestwall Gypsum Co	Acquisition of Bestwal Gypsum Co. by Georgia-Pacific Corp.	571,030.00	Financial advice re merger.
British-American Tobacco Co. Ltd	Acquistion of American Lentheric division of Helene Curtis Industries, Inc. by British-American Tobacco Co., Ltd.	50,000.00	Financial advice re purchase.
Continental Grain Co	Tender offer to purchase 413,000 shares of common stock of Allied Mills Inc.	75,786.04	Dealer-manager and soliciting dealer fees.
Lone Star Cement Corp	Acquisition of Pacific Cement & Aggregates.	150,000.00	Financial advice re merger.
1966			
First National City Bank	Proposed acquisition of Carte Blanche Corp. by First National City Bank.	75,000.00	Financial advice re proposed merger.
RCA Corp	Acquisition of Random House, Inc. by RCA.	250,000.00	Financial advice re merger.
Engelhard Hanovia, Inc	Sale of Connors & Hoffmann Footwear Co. to Engelhard Hanovia.	195,000.00	Do.
Sofina	Sale of Sofina's and Solec's stock interest in Compagna Tecnica Industrie Petroli, S.p.A. to Arthur McKee & Co.	20,000.00	Financial advice re acquisition.
ITT Consumer Services Corp	Acquisition of Airport Parking Co. of America by ITT Consumer Services Corp.	150,000.00	Financial advice re merger.
George Murphy	Tender offer for common stock of Studebaker Corp.	12,500.00	Dealer-manager fee.
1967			
International Telephone and Telegraph Corp.	Acquisition of Claude Paz & Visseaux by International Telephone and Telegraph Corp.	125,000.00	Financial advice re merger.
Douglas Aircraft Co., Inc	Acquisition of Douglas Aircraft Co., Inc. by McDonnell Co.	1,000,000.00	Do.
Transamerica Corp	Tender offer by Transamerica Corp. for shares of United Artists Corp.	482,088.50	Financial advice, dealer-manager fee and soliciting dealer fees.
RCA Corp	Acquisition of The Hertz Corp. by RCA Corp.	750,000.00	Financial advice re merger.
General Aniline & Film Corp	Acquisition of The Ruberoid Co. by General Aniline & Film Corp.	37,500.00	Do.
Ebasco Industries Inc	Acquisition of American & Foreign Power Co., Inc. by Ebasco Industries Inc.	110,000.00	Do.
Carter-Wallace, Inc	Acquisition of Foster-Milburn Co. stock by Carter-Wallace, Inc.	12,500.00	Financial advice re stock acquisition.
W. Liquidating Corp	Acquisition of Wagner Electric Corp. by Studebaker Corp.	250,000.00	Financial advice re merger.
General Aniline & Film Corp	Tender offer for Shelby Business Forms, Inc.	17,500.00	Management fee on tender offer.
Charles E. Merrill Books, Inc	Acquisition of Charles E. Merrill Books, Inc. by Bell & Howell Co.	60,000.00	Financial advice re merger.
1967–68			
Engelhard Minerals & Chemicals Corp.	Acquisition of Minerals & Chemicals Philipp Corp. by Engelhard Industries, Inc.	750,000.00	Do.
1967			
IRC, Inc	Acquisition of IRC, Inc. by TRW Inc.	50,000.00	Do.
Toledo Scale Corp	Acquisition of Toledo Scale Corp. by Reliance Electric Co.	100,000.00	Do.
Sonotone Corp	Offer by Clevite Corp. to acquire shares.	12,500.00	Valuation of minority shares prior to merger.

See footnotes at end of table, p. 154.

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LAZARD FRERES & CO.—COMPENSATION RECEIVED FOR MERGER AND ACQUISITION SERVICES, JAN. 1, 1964–SEPT. 5, 1969 [1]—Continued

Year and compensation paid by	Transaction	Compensation	Description of services provided
1968			
Engelhard Minerals & Chemicals Corp.	Re 1967 acquisition program	$18,750.00	General financial services re acquisitions.
United Fruit Co	do	80,000.00	Financial advice in connection with general acquisition program.
American Potash & Chemical Corp.	Acquisition of American Potash & Chemical Corp. by Kerr McGee Corp.	125,000.00	Financial advice re merger.
Glaxo Group Ltd	Glaxo Group Ltd. purchase of interest in BDH Group Ltd.	12,050.00	Assistance in negotiations re purchase of partial interest in BDH.
Studebaker Corp	Merger of Worthington Corp. and Studebaker Corp.	75,000.00	Financial advice re merger.
Levitt and Sons Inc	Acquisition of Levitt & Sons Inc. by International Telephone and Telegraph Corp.	250,000.00	Do.
Canteen Corp	Sale of Rowe Division of Canteen Corp.	75,000.00	Financial advice re sale.
Occidental Petroleum Corp	Acquisition of Island Creek Coal Co. by Occidental Petroleum Corp.	(2)	Financial advice re merger.
RCA Corp	Sale of stock interests in Grosset & Dunlap, Inc. to NGC Publishing Co.		
Little Brown & Co	do	117,092.18	Financial advice re sale of stock.
Book of the Month Club, Inc	do		
Harper & Row, Publishers, Inc	do		
National Periodical Publications, Inc.	Acquisition of National Periodical Publications, Inc. by Kinney National Service, Inc.	[3] 300,000.00	Financial advice re merger.
International Telephone and Telegraph Corp.	Acquisition of Rayonier Inc. by International Telephone and Telegraph Corp.	600,000.00	Do.
American Commercial Lines, Inc	Acquisition of American Commercial Lines, Inc. by Texas Gas Transmission Corp.	100,000.00	Do.
University Computing Co	Tender offer for shares of common stock of Western Union Telegraph Co.	25,000.00	Fee for managing tender offer.
International Telephone and Telegraph Corp.	Acquisition of Pennsylvania Glass Sand Corp. by International Telephone and Telegraph Corp.	250,000.00	Financial advice re merger.
Standard Packaging Corp	Sale of Eastern Division assets of Standard Packaging Corp. to Lincoln Pulp & Paper Co.	60,000.00	Financial advice re sale.
Treadwell Corp	Treadwell Corp	75,000.00	Merger opportunities study.
Quinn Family	Acquisition of K. J. Quinn & Co., Inc. by Products Research & Chemical Corp.	(4)	Financial advice re acquisition.
International Telephone and Telegraph Corp.	Acquisition of Continental Baking Co. by International Telephone and Telegraph Corp.	400,000.00	Financial advice re merger.
Libbey-Owens-Ford Glass Co	Acquisition of Aeroquip Corp. by Libbey-Owens-Ford Glass Co.	100,000.00	Do.
Norton Simon Inc	Consolidation of Hunt Foods and Industries, Inc., McCall Corp. and Canada Dry Corp.	50,000.00	Do.
Ebasco Industries, Inc	Tender offer for Taylor Instrument companies.	10,974.00	Dealer-manager fees.
Owens-Illinois, Inc	Acquisition of Lily-Tulip Cup Corp. by Owens-Illinois, Inc.	500,000.00	Financial advice re merger.
Farrington Manufacturing Co	Purchase of Comptabilite Simplifice Moderna.	50,000.00	Financial advice re purchase.

See footnotes at end of table, p. 154.

LAZARD FRERES & CO.—COMPENSATION RECEIVED FOR MERGER AND ACQUISITION SERVICES, JAN. 1, 1964-SEPT. 5, 1969 [1]—Continued

Year and compensation paid by	Transaction	Compensation	Description of services provided
1969			
United Fruit Co.	United Fruit Co.	[2] $250,000.00	Financial advice re acquisition program.
Cosmos Broadcasting Corp.	Acquisition of Cosmos Broadcasting Corp. by Liberty Corp.	50,000.00	Financial advice re merger.
Loew's Theatres, Inc.	Acquisition of Lorillard Corp. by Loew's Theatres, Inc.	1,000,000.00	Do.
American Machine &Foundry Co.	Acquisition of Harley-Davidson Motor Co. by American Machine & Foundry Co.	33,000.00	Do.
Carter-Wallace, Inc.	Sales of shares of Millmaster Onyx Corp. to American Research & Development Corp.	25,000.00	Financial advice re sale.
International Telephone and Telegraph Corp.	Acquisition of United Homes Corp. by International Telephone and Telegraph Corp.	50,000.00	Financial advice re merger.
AMK Corp.	Exchange offer by AMK Corp. for shares of United Fruit Co.	384,802.50	Dealer-manager and Soliciting dealer fees.
Sinclair Oil Corp.	Acquisition of Sinclair Oil Corp. by Atlantic Richfield Co.	200,000.00	Financial advice re merger.
International Telephone and Telegraph Corp.	Acquisition of Canteen Corp. by International Telephone and Telegraph Corp.	250,000.00	Do.
McLean Industries, Inc.	Acquisition of McLean Industries, Inc. by R. J. Reynolds Tobacco Co.	500,000.00	Do.
Kinney National Service, Inc.	Acquisition of Warner Bros.-Seven Arts Limited by Kinney National Service, Inc.	[3] 1,500,000.00	Do.
Northwest Industries, Inc.	Exchange offer for B. F. Goodrich Co.	250,000.00	Dealer-manager fee.
Ebasco Industries, Inc.	Acquisition of Ebasco Industries Inc. by Boise Cascade Corp.	750,000.00	Financial advice re merger.

[1] Hearings: 3-735-742.
[2] 4,398 shares of $4 convertible preferred stock.
[3] Payable in installments.
[4] 6,000 shares PRC common stock.

CBWL did not show revenues from merger fees until 1968. In that year merger fees were $489,465, or 7.1 percent of gross revenues of $6.9 million. For the year ended June 30, 1969, revenues from merger fees amounted to $2.5 million, or 19.1 percent of total revenues of $13.2 million. In 1969, CBWL revenues from merger fees ($2.5 million) were only slightly less than its net income after taxes on income ($2.7 million).

CBWL listed merger and finders fees for 8 transactions in 1968, and for 13 transactions in 1969. In 1968, Gulf & Western paid a fee of $27,000 in connection with the North & Judd merger. The 1969 fees included a payment of $750,000 by Kleiner, Bell & Co. for the Allis-Chalmers-G&W transaction, $750,000 from Leasco for the Reliance Insurance Company takeover, and $250,000 from National General Corp. for Great American Holding Company. The following table lists CBWL merger and finders fees for 1968 and 1969:

COGAN, BERLIND, WEILL & LEVITT, INC.

MERGER AND FINDERS FEES [1]

Received (paid)			
From (to)	For	Date	Amount
1969			
Tech-Aerofoam Products, Inc.	Tech-Aerofoam—Rockaway	July 18, 1968	$25,000
Kleiner, Bell & Co.	Allis-Chalmers, G & W	Sept. 12, 1968	750,000
National General Corp.	NGC-GAH	Sept. 30, 1968	250,000
Great West Saddlery	Accessible Computers Corp.	(2)	100,000
Kinney National Service	Kinney, Sandgate	Nov. 3, 1968	42,500
Leasco Data Processing Equipment Corp.	Reliance Insurance Co.	Nov. 4, 1968	750,000
Sandgate Corp.	Hadden Tool, Sandgate	Dec. 31, 1968	50,000
Downe Communications Corp.	Downe, Ladies Home Journal (Curtis Publishing).	Jan. 23, 1969	50,000
Allen Electric	Allen, Tempo	Dec. 31, 1968	50,000
Do	Allen, Crown Steel	Feb. 14, 1969	5,000
Do	Allen	Mar. 12, 1969	50,000
Rapid-American Corp.	Rapid-Glen Alden	(2)	350,000
Subtotal			2,472,500
1968			
Allen Electric	Allen, Tempo	July 26, 1967	25,000
Do	Allen, Crown Steel	do	55,716
Gulf & Western	North & Judd		27,000
Nortex, Inc.	Formation of Nortex	Nov. 22, 1967	70,000
Kleiner, Bell & Co.	General Bronze	Mar. 27, 1968	40,000
Pacific Theatre	Disposition of threatres for Stanley Warner	May 9, 1968	50,000
		July 30, 1968	50,000
		Aug. 30, 1968	100,000
Allen Electric	Allen, Anzoc	Mar. 12, 1968	50,000
U.S. Smelting	Cudahy Packing	Oct. 28, 1968	25,000
Subtotal			492,716
Total			2,965,216

[1] Hearings: 2-775-776.
[2] Accrued.

CBWL revenues from merger and acquisition activity were not limited to direct payments from a finders fee. In addition, as circumstances warranted, CBWL could receive fees as a dealer-manager, a solicitation fee, a brokerage fee when institutional clients purchased stocks in a company ripe for takeover and another brokerage fee

when the stock was tendered. The nature of this business is shown in the following colloquy at the hearing:

> Mr. HARKINS. Now, let's examine how Cogan, Berlind's business is stimulated by this type of activity you were doing.
>
> First of all, if you could generate interest in a merger, you would get a finder's fee, is that right?
>
> Mr. LEVITT. If we could complete a merger.
>
> Mr. HARKINS. If you could generate interest and complete a merger, you would get a finder's fee?
>
> Mr. LEVITT. That is correct.
>
> Mr. HARKINS. If you were the tender agent or dealer-manager, you would get the dealer-manager's fee?
>
> Mr. LEVITT. Yes, sir.
>
> Mr. HARKINS. Generally, how do you compute the dealer-manager's fee—50 cents a share?
>
> Mr. LEVITT. Well, there is a formula for the computation of the dealer-manager's fee. In this particular case it was 45 cents.
>
> Mr. HARKINS. Would you be eligible for a solicitation fee?
>
> Mr. LEVITT. Yes.
>
> Mr. HARKINS. And this fee was generally more than the dealer-manager fee? This would be a 90-cent fee, I think, in the case of Reliance?
>
> Mr. LEVITT. Yes. Just like any other solicitation that we may have been involved in.
>
> Mr. HARKINS. If you encourage your institutional clients to purchase stock in these insurance companies, you would get paid a brokerage fee if they purchased the stock, wouldn't you?
>
> Mr. LEVITT. Yes.[344]

In the Leasco-Reliance acquisition, for example, Carter, Berlind was able to derive the following fees: a $750,000 finder's fee;[345] brokerage fees of $46,925 on the 132,600 shares purchased by Leasco between March 13, 1968 and April 2, 1968;[346] soliciting dealer's fees of $230,000 on Reliance shares (at a rate of 90 cents per share) tendered to Leasco through Carter, Berlind;[347] plus additional brokerage fees in an undisclosed amount on the 1,200,000 shares of Reliance purchased by Carter, Berlind for its customers during the period January 1, 1968 to June 15, 1968, and the sales of 180,000 Reliance shares during the same period.[348] Brokerage commissions from these transactions are estimated to exceed $485,000. Carter, Berlind thus derived total fees relating to the Reliance transaction in excess of $1,511,925.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

February 12, 1976

Mr. Gerald Hellerman
Subcommittee on Antitrust
and Monopoly
United States Senate
Washington, D.C. 20510

Dear Mr. Hellerman:

Attached is a memorandum of information in response to your inquiry respecting the finders, investment banking, or brokerage fees paid in certain corporate acquisitions. This information confirms that given to Mr. Bernie Nash by telephone.

If I can be of any further assistance, please do not hesitate to call me.

Sincerely,

Neal S. McCoy
Associate Director

Attachment

MEMORANDUM

February 12, 1976

To: Gerald Hellerman, Financial Adviser
Senate Subcommittee on Antitrust and Monopoly

From: Neal S. McCoy, Associate Director
Division of Corporation Finance

Re: Inquiry into finders, investment banking, or brokerage fees paid in certain acquisitions

Last week you requested information about finders, investment banking, or brokerage fees paid in connection with certain acquisitions or merger transactions. We have reviewed our files and can report to you the following information. If you desire further information, please let me know.

Anaconda Co. - Walworth Co. (Subsidiary of I. U. International)

Anaconda acquired Walworth for cash and notes ($40 million). There have been no reports filed with the Commission reflecting the acquisition. (Moody's Industrials, page 2290, week of October 31, 1975)

Esmark Inc. - International Playtex Co. (Subsidiary of Rapid-American Corp.)

Playtex was acquired by Esmark November 7, 1975 for cash and securities. There was no action taken by shareholders of either corporation. Consequently, no separate filings were made with the Commission. Disclosure in Form 8-K for November 30, 1975 includes the merger agreements which have no provision for any finders, investment banking, or brokerage fees.

General Electric Co. - Utah International Inc.

There has only been an announcement (December 15, 1975) of the proposed acquisition for stock by General Electric. No filings have been made with the Commission.

Loews Corp. - CNA Financial Corporation

Cash tender offer. Offer discloses fees to Salomon Brothers acting as Dealer-Manager of .10§ per share with $50,000 minimum and $500,000 maximum. Offer was successful and was terminated on December 18, 1974. No disclosure of exact amount of fee paid. Form 8-K for December 31, 1974.

Southwestern Life Corp. - Liberty National Life Insurance Co.

These companies announced the termination of the proposed merger during the week of January 27, 1976. (Moody's Banks and Finance, page 1146)

Standard Oil Company of Indiana - Pasco Inc.

(Acquisition of certain properties only)

Pasco solicited its shareholders for sale of properties. Proxy statement disclosed fees for investment banking services to Goldman, Sachs & Co. of $100,000 from Pasco and $100,000 from Studebaker-Worthington Inc.("SWI") (Pasco's 55% shareholder) and to Oppenheimer & Co., Inc. of $50,000 from Pasco. Goldman, Sachs and Oppenheimer will also receive aggregate commissions of 1% of amount received upon sale of Pasco's remaining assets or $200,000 if these assets are sold to SWI. On December 30, 1975 Pasco shareholders approved the sale. No disclosure of exact fees paid as transactions not yet complete. Form 8-K for December 31, 1975.

United Technologies Corp. - Otis Elevator Co.

Cash tender offer. Offer discloses fees to Lazard Freres & Co., acting as Dealer-Manager, of $250,000 plus .15§ per share, not to exceed $750,000, for each share over $250,000 equivalent. Offer was successful and terminated November 14, 1975. Form 13D's and 14D's filed, Form 8-K for November 31, 1975 discloses acquisition. No disclosure of exact amount of fees paid.

International Telephone and Telegraph Corp. - Hartford Fire Insurance Co.

See attached memo

MEMORANDUM

February 11, 1976

TO : Gerald J. MacFarlane, Attorney
Division of Corporation Finance

FROM: John D. Arterberry, Attorney
Division of Enforcement

RE : Inquiry into finders, investment banking, or brokerage fees paid in certain acquisitions

The following information concerns the acquisition by International Telephone and Telegraph Corp. of Hartford Fire Insurance Co.

ITT acquired HFI in a stock-for-stock transaction in 1970. Lazard Freres & Co. received a fee of approximately $1,000,000 1/ for investment banking services relating to the acquisition. In addition, under a profit-sharing arrangement with an Italian bank, Mediobanca, Lazard received $1,085,000 as its share of $2,170,000 in fees paid to Mediobanca by ITT in connection with a transaction undertaken to secure a favorable tax ruling from the IRS for the acquisition by ITT of HFI. This transaction was arranged with the assistance of Lazard and involved the transfer of approximately 1.7 million shares of HFI stock from ITT to Mediobanca. Furthermore, pursuant to an indemnification agreement granted to Lazard by ITT by which ITT agreed to indemnify and hold harmless Lazard from any claims arising out of the ITT-Mediobanca transaction, ITT has paid to date approximately $159,000 for legal services rendered to Lazard. 2/

1/ While ITT filings do not disclose the amount of fees paid per acquisition, a March 10, 1973 Business Week article concerning Felix G. Rohatyn cited data from the House Antitrust Subcommittee as listing the fee at $1,000,000+.

2/ ITT filings also disclose that, pursuant to an ITT corporate by-law providing for mandatory indemnification of ITT officers and directors, ITT has paid approximately $240,000 for legal services rendered to Felix G. Rohatyn since January 1, 1972.

THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

February 19, 1976

Honorable Philip A. Hart
Chairman
Subcommittee on Antitrust and Monopoly
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

When the Subcommittee on Antitrust and Monopoly held hearings on S. 1284 during the spring and summer of 1975, the Administration expressed support for the major provisions of the bill, although it generally opposed Title VI. There has been division within the Administration, however, regarding the desirability of Title V, and the Administration position has been reconsidered in light of the scheduled consideration of the bill by the full Judiciary Committee.

Although the Administration adheres to its previously expressed position on other provisions of S. 1284, and particularly Title II of the bill, this letter is to inform you that the Administration does not now support Title V in its present form.

The Administration does not support enactment of the premerger stay provision of Title V, preferring instead to rely upon existing decisional and statutory law to govern the issuance of preliminary injunctions in merger actions filed by the Department of Justice and the Federal Trade Commission.

The Administration continues to support enactment of a premerger notification provision, providing that the waiting period and extension period are reduced to 30 days and 20 days respectively. Furthermore, to assure that challenges to pending mergers are considered on an expedited basis by district courts, the Administration would encourage enactment of a provision directing the Chief Judge of the appropriate United States Court of Appeals to assign a District Court judge who is able to proceed on an expedited basis with the case, and further to direct that a hearing on the government's motion for a preliminary injunction be held at the earliest possible time, taking precedence over all matters except older matters of the same character and trials pursuant to 18 U.S.C. §3161.

If I may be of any assistance to the Subcommittee or the Committee, please do not hesitate to contact me.

Sincerely,

Harold R. Tyler, Jr.

Treasury Department Proposed Amendments to S. 1284

The Department of the Treasury recommends that the following amendments be made in S. 1284.

1. Title V should be amended to eliminate the provision requiring the automatic stay of acquisitions pending litigation of the government's antitrust suit. In addition, the premerger notification procedure of Title V should be amended to limit the statutory waiting period to 30 days with provision for a 20-day extension. The Administration's position on Title V is set forth in the attached letter of Deputy Attorney General Tyler to Senators Hart and Scott.

2. Title I should be deleted since it sets forth a number of findings and policies which are substantiated by neither empirical evidence nor economic theory. (Justice agrees with this position.) Treasury's objections to Title I are explained in the attached memorandum by Sidney Jones, Assistant Secretary of the Treasury for Economic Policy.

3. Section 401 of Title IV should be amended to eliminate the power of a State to recover in an antitrust suit damages to the general economy of the State or its political subdivisions. The provision contains no workable criteria for determining damages to the economy.

4. Title VI, which would amend Section 5(a) of the Clayton Act to provide that a no contest plea in a criminal antitrust proceeding may be used as prima facie evidence in a subsequent civil action, should be deleted. This provision would result in considerable cost increases in the government's enforcement program, while providing only minor benefits to plaintiffs in private treble damages suits.

5. Section 704 of Title VII should be deleted. This provision would wholly rewrite the antitrust law developed over the last 80 years under Section 2 of the Sherman Act. It would punish as a criminal offense any isolated single act or practice intended to exclude competition - such as a price reduction or promotional campaign - regardless of its impact on the market or its benefits to consumers. It would do this by eliminating the existing requirement that a plaintiff prove (1) what it is (i.e., the "relevant market") the defendant is alleged to have attempted to monopolize, and (2) a dangerous probability of success in the attempt. This important substantive change in the antitrust law should not be included in the bill which is otherwise devoted exclusively to procedural matters.

Attachments

THE SECRETARY OF THE TREASURY
WASHINGTON 20220

December 12, 1975

MEMORANDUM FOR MR. RICHARD ALBRECHT

FROM: Sidney L. Jones

Subject: Antitrust Laws - Proposal by Senators Hart and Scott

In addition to the legal concerns about specific details of the bill there are at least four major objections to the economic arguments presented in Title V: (1) that oligopoly (that situation in which a small number of companies control the supply of a commodity or service in a given market) and monopoly are the same thing; (2) that the existence of oligopoly or monopoly have "contributed significantly" to unemployment, inflation, underutilization of economic capacity, a reduction in exports, and an adverse effect on the balance of payments; (3) that there are known studies that have identified conditions of excessive concentration and anticompetitive behavior in various industries (not specified); and (4) that vigorous enforcement of the antitrust laws should be directed at reducing monopoly and oligopoly.

Oligopoly and monopoly are not the same thing, either in theory or practice. Where monopolies do exist, governments have tended to regulate them. Oligopolies are entirely different because competition, often very intense, continues. This is particularly true if open international trade is sustained. In those specific situations where illegal or anticompetitive acts occur, strong corrective action should occur but it should not be government policy to disrupt the market system that has developed as long as it serves the interests of the people.

The claim that unemployment, inflation, underutilization of capacity and erosion of trade and balance-of-payments deficits have resulted from oligopoly is not substantiated by the facts. To the contrary, inflation has occurred in the services and regulated industries which are allegedly competitive because of the large number of firms or the coercion of governments. Even a casual analysis of actual economic developments beyond the usual theoretical claims of a minority of economists, would indicate that the claims made in Title V are either exaggerated or incorrect.

As to the claim that specific examples of excessive concentration and anticompetitive behavior exist, the obvious solution is to correct these "specific" cases using the legal powers already in existence. The reality is that most of these claims cannot be substantiated. However, if there are anticompetitive practices then the antitrust reaction should be vigorous. Unfortunately, the people who call for vigorous antitrust action are frequently the most protectionist when their special interest is threatened.

Finally, the goal of antitrust action should be to promote fair competitive behavior as the best means of achieving our national economic goals. It should not be to attack any particular form or size of economic activity.

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